TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 617

ARKALA STATE BANK OF ARKALA [illegible]
OF LETELL ET AL. APPELLANTS

vs.

[illegible] E. BOLLEN, AS BANK COMMISSIONER
STATE OF KANSAS AND MARK TULLEY, AS
TREASURER OF THE STATE OF KANSAS

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF KANSAS

FILED JUNE 26, 1916.

(22,238.)

I.

That your orators and each of them are corporations duly organized, existing and doing business under and by virtue of the banking laws of the State of Kansas and have been so organized, existing and doing business since long prior to March 6, 1909.

That the defendant, Joseph N. Dolley, is and at all of the times hereinafter mentioned was the duly appointed, qualified and acting Bank Commissioner of the State of Kansas.

That the defendant, Mark Tully, is and at all of the times hereinafter mentioned was the duly elected, qualified and acting State Treasurer of the State of Kansas.

That the defendants Joseph N. Dolley, and Mark Tully as such officers are made defendants herein for the reason that they are charged with the duties and responsibilities of enforcing certain provisions of the banking act of the State of Kansas, approved March 6, 1909, and hereinafter referred to.

II.

That the matter in dispute herein exceeds, exclusive of interest and costs, the sum or value of two thousand dollars and arises under the Constitution of the United States and the laws of the United States.

6 III.

That on and prior to the matters hereinafter complained of there existed in the state of Kansas a banking act which took effect March 11th, 1897, entitled as follows: "An Act relating to banks and banking; providing for the organization, management, control, regulation and supervision of banks, and providing penalties for violation of the provisions of this act, and repealing Chapter 43 of the Laws of 1891;" and which said banking act with amendments thereto, up to and including the special session of 1908, contained general provisions for the organization, government and regulation of state banks in the state of Kansas, and which said banking laws of the state of Kansas did not have application to National Banks, and National Banks were in no manner attempted to be controlled or governed thereby.

In said banking laws of the state of Kansas last above referred to, there were no provisions of any kind or nature relating to the creation of a guaranty fund for security of depositors, and no provision by which any of the said banks so organized under the laws of the state of Kansas were required, or could be required to make any deposits with the state treasurer of either bonds or money, or submit to any assessments for the creation of a guaranty fund for the securing of deposits as in the act of the state of Kansas subsequently passed, and hereinafter more particularly complained of.

That at the time when the existing state banks in the state of Kansas (including complainants) were severally organized, the said statute laws of the state of Kansas provided (section 10) that "the shareholders of every bank organized under this act shall be addi-

tionally liable for a sum equal to the par value of stock owned, and no more"; and there was no provision in the said banking laws by which any of the assets of any of the said banks of any kind or nature should be appropriated by the Bank Commissioner or by the state treasurer, or by any other person in any manner or form for the purpose of paying claims of depositors in any other bank or banks, and that such appropriation of bonds, money or assets of any of the said banks (including complainants) would have been a violation of the provisions of the said banking laws of the state of Kansas, and more particularly in violation of the provisions of Sections 10 and 11 of the said banking laws.

7 In case of insolvency of any of the said state banks, it is provided in Section 28 of the said banking act that all moneys arising from the assets of the said bank or banks, including the moneys realized from the stockholders thereof, should be paid to the creditors of the bank without discrimination or preference as between such creditors, and that each and all of the said banks (including complainants) became organized and entered upon the banking business and obtained credit and deposits and assumed obligations under the provisions of said banking laws by which each and singular of such creditors should receive an equal pro rata proportion of the assets of any of the said banks in case of insolvency; and that complainant banks, relying upon said laws, and acting in good faith thereunder, have made deposits with other state banks and have given credit to other state banks in good faith, relying upon the laws of the state of Kansas to the end that in the event of the insolvency of any bank or banks to which complainants have so extended credits, or with whom they have made deposits such bank or banks would be liable unto these complainants for the payment of a pro rata share of the assets of such insolvent banks (including the liability of stockholders) and without any preferential claim in favor of private depositors, as hereinafter more particularly complained of.

That under the said banking laws of the state of Kansas, it is provided that the Bank Commissioner should issue to each of the state banks a certificate showing that said banks were entitled and authorized to transact a general banking business, as provided therein, and that each and singular of the said state banks (including complainants) received such certificate, and under and by virtue of the right and authority therein and thereby vested in the said banks they have ever since the receiving of said certificates severally continued in the banking business, and were and are of right entitled to continue in said banking business.

That under the banking laws of the state of Kansas the right of persons, firms or associations to do a banking business was recognized and authorized, and that under and by virtue thereof there have heretofore been organized, and are now existing, private banks in the State of Kansas, which are denied the privileges of the act hereinafter complained of.

8 IV.

That on or about the 6th day of March, 1909, the legislature of the State of Kansas passed an act entitled: "An act providing for the security of depositors in the incorporated banks of Kansas, creating the bank depositors' guaranty fund of the state of Kansas and providing regulations therefor, and penalties for the violation thereof; which act is Chapter 61 of the Session Laws of Kansas of 1909.

That by Section 1 of said act it is, among other things, provided that, "any incorporated state bank having a paid up and unimpaired surplus fund equal to ten per cent. of its capital, and any bank which may after the passage of this act be authorized to do business in this State, and which shall have been actively engaged in the business of banking for at least one year," is authorized and empowered to participate in the assessments and benefits, and to be governed by the regulations of the bank depositors' guaranty fund of the state of Kansas in said act, "provided that the limitation of one year shall not prevent such participation by a new bank at any time in any city or town in which all banks shall have neglected or failed to become guaranteed banks under the provisions of this act, for a period of six months after the taking effect of this act."

The purpose and intent of the said provisions of the said Section 1 were to confine and limit the privileges of the said guaranty fund provisions of the said act to "incorporated" state banks and to exclude therefrom private banks and trust companies; and by way of inducement and indirect compulsion, to require all existing incorporated state banks to accept of the provisions of said act, it was provided, as above set forth, that if the existing banks in any city or town should neglect or fail to become guaranteed banks within the period of six months after the said act should go into effect, that a new bank might be organized in such city or town and immediately be permitted to become a guaranteed bank under the provisions of the said act and thereby be given the preferential rights and privileges, if any there be, under the said act, and to the detriment and disadvantage of the existing banks in said city or town.

That by Section 8 of said act it is further provided that
9 trust companies and private banks and national banks, if they shall reorganize as incorporated state banks may become guaranteed banks by complying with the provisions of the said act as in said Section 8 directed and provided. The purpose and intent of said Section 8, coupled with the provisions of said Section 1, above referred to, was and is to require all trust companies and all private banks lawfully organized and doing business under the laws of the State of Kansas, and all national banks lawfully organized and doing business under and by virtue of the national banking laws of the United States to become incorporated state banks under the laws of the state of Kansas subject to the control of the Bank Commissioner of the state of Kansas, and by way of inducement thereto that they, when so reorganized, may become guaranteed state banks of the state of Kansas; otherwise that they shall be and are intended to be discriminated against under and by virtue of the said act of the State of Kansas of March 6th, 1909, herein complained of; and

by reason of the premises before stated, and others hereinafter to be referred to, the said act of the State of Kansas, while voluntary in form, is in its application, force and effect a compulsory law in that it compels all banks, private or incorporated, in the state of Kansas, and all trust companies in the state of Kansas, and all national banks in the state of Kansas, to become incorporated state banks of the state of Kansas, or be unjustly and unlawfully discriminated against, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, which provides, among other things; "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

V.

In Section 1 of said act of March 6th, 1909, it is further provided as one of the preliminary proceedings for a bank to become a guaranteed bank that "a resolution of its board of directors, authorized by its stockholders," asking therefor shall be filed with the Bank Commissioner, and which said provisions by its terms in force and effect authorizes such resolution by a majority of a quorum of the board of directors when authorized by a majority of the stock present and voting at a regular or special stockholders' meeting, and by reason whereof the stockholders not present and voting at such stockholders' meeting, and minority directors, and stockholders, although present and dissenting therefrom, are intended to be made powerless to prevent the said bank or banks from becoming guaranteed banks, and that said stockholders not present and voting, and stockholders present and dissenting therefrom and minority members of the board of directors are by the terms and provisions of said act deprived of property and of property rights without due process of law, and are denied the equal protection of the laws in violation of Section 1 of Fourteenth Amendment of Constitution of the United States which provides that "no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and is in violation of section 1 of the Bill of Rights of the Constitution of the State of Kansas, which provides, "All men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness," and in violation of Section 2 of said Bill of Rights which provides, "all political power is inherent in the people, and all free governments are founded on their authority and are instituted for their equal protection and benefit."

VI.

By section 2 of the said Bank Guaranty Law of March 6th, 1909 it is further provided that the banks, before receiving a certificate that they are entitled to the benefits of said act, as evidence of good faith shall deposit with the State Treasurer of the State of Kansas, subject to the order of the Bank Commissioner, United States bonds, or other bonds, as in said section provided, to the amount of "$500

(22,238.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 617.

ASSARIA STATE BANK OF ASSARIA, CITIZENS BANK OF AXTELL, ET AL., APPELLANTS,

vs.

JOSEPH N. DOLLEY, AS BANK COMMISSIONER OF THE STATE OF KANSAS, AND MARK TULLEY, AS STATE TREASURER OF THE STATE OF KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 19, 1910.

1 The United States of America to Joseph N. Dolley, as Bank Commissioner of the State of Kansas, and Mark Tulley, as State Treasurer of the State of Kansas, appellees, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, thirty days from and after the day this Citation bears date, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the District of Kansas, wherein Assaria State Bank of Assaria, Citizens Bank of Axtell, Baileyville State Bank of Baileyville, First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank, of Coats, State Bank of Colwich, Cloud County Bank, of Concordia, Danville State Bank, of Danville, State Bank of Downs, Downs, Union State Bank, of Downs, Falun State Bank, of Falun, Marion County State Bank, of Florence, Ford State Bank, of Ford, Citizens Bank, of Frankfort, Farmers State Bank, of Greensburg, Citizens State Bank, of Grenola, Bank of Hamlin, of Hamlin, Farmers & Merchants State Bank, of Harper, Farmers State Bank, of Hazelton, Morrill and Janes Bank, of Hiawatha, State Bank of Holton, of Holton, State Bank of Home City, of Home City, Bank of Horton, Iuka State Bank, of Iuka, Jamestown State Bank, of Jamestown, State Bank of Jennings, of Jennings, State Bank of Lancaster, of Lancaster, Exchange Bank of Lenora, McPherson Bank, of McPherson, Citizens State Bank of Medicine Lodge, Muscotah State Bank, of Muscotah, Olsburg State Bank, of Olsburg, Peru State Bank, of Peru, First State Bank
2 of Portis, Bank of Powhattan, Powhattan, Peoples Bank of Pratt, Sharon Valley State Bank of Sharon, South Haven Bank, of South Haven, Kendall State Bank, of Valley Falls, Security State Bank, of Wellington, Wilmore State Bank, of Wilmore, Farmers State Bank, of Whiting, Willis State Bank, of Willis, Bank of Winchester, of Winchester, Citizens Bank of Hazelton, are appellants, and you are appellees in appeal, to show cause, if any there be, why the judgment rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John C. Pollock, Judge of the Circuit Court of the United States for the District of Kansas, this 16th day of May in the year of our Lord one thousand nine hundred and ten.

JOHN C. POLLOCK,
United States District Judge for the District of Kansas.

Service of the foregoing citation is hereby acknowledged this 18th day of May, 1910.

F. S. JACKSON,
Attorney General.
A. C. MITCHELL,
G. H. BUCKMAN,
Solicitors for Defendants Joseph N. Dolley, as Bank Commissioner, and Mark Tulley, as State Treasurer.

3 [Endorsed:] No. 8816. U. S. Circuit Court, District of Kansas. Assaria State Bank et al. vs. Joseph N. Dolley et al. Citation. Filed May 16, 1910. Geo. F. Sharitt, Clerk.

4 In the Circuit Court of the United States for the District of Kansas, First Division.

ASSARIA STATE BANK OF ASSARIA, CITIZENS BANK OF AXTELL, Baileyville State Bank, of Baileyville; First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank, of Coats; State Bank of Colwich, Cloud County Bank of Concordia, Danville State Bank, of Danville; State Bank of Downs, Downs; Union State Bank of Downs; Falun State Bank, of Falun; Marion County State Bank of Florence, Ford State Bank, of Ford; Citizens Bank of Frankfort; Farmers State Bank of Greensburg; Citizens State Bank of Grenola; Bank of Hamlin, of Hamlin; Farmers & Merchants State Bank of Harper; Farmers State Bank of Hazelton; Morrill and Janes Bank of Hiawatha, State Bank of Holton, of Holton; State Bank of Home City, of Home City; Bank of Horton, Iuka State Bank, of Iuka; Jamestown State Bank, of Jamestown; State Bank of Jennings, of Jennings; State Bank of Lancaster, of Lancaster; Exchange Bank of Lenora, McPherson Bank, of McPherson; Citizens State Bank of Medicine Lodge; Muscotah State Bank of Muscotah; Olsburg State Bank, of Olsburg; Peru State Bank, of Peru; First State Bank of Portis, Bank of Powhattan, Powhattan; Peoples Bank of Pratt, Sharon Valley State Bank, of Sharon; South Haven Bank, of South Haven; Kendall State Bank of Valley Falls; Security State Bank of Wellington; Wilmore State Bank, of Wilmore; Farmers State Bank of Whiting; Willis State Bank, of Willis; Bank of Winchester, of Winchester; Citizens Bank of Hazelton, Complainants,

vs.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas, and Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

Bill of Complaint.

To the Honorable Judges of said Court in chancery sitting:

The above named complainants, each of which has its principal place of business in the State of Kansas and in the town following its name, bring this, their bill of complaint, on their own behalf and on behalf of all other banks within the State of Kansas similarly situated and who desire to join herein and share the benefits of this proceeding against Joseph N. Dolley, as Bank Commissioner of the State of Kansas, and Mark Tulley as State Treasurer of the

5 State of Kansas, both of the City of Topeka in the State of Kansas, and thereupon your orators and each of them complain and say:

for every $100,000 or fraction thereof, of its average deposits eligible to guaranty (less its capital and surplus)" provided that each bank shall so deposit not less than $500 and which bond shall be carried under the heading "Guaranty fund with State Treasurer." In lieu of bonds, the said banks may deposit money which shall be exchangeable for bonds at the option of the bank. In addition to said deposit "each bank shall pay in cash an amount equal to one-twentieth of one per cent of its average deposits eligible to guaranty, less its capital and surplus, and the same shall be credited
11 to the Bank depositors' guaranty fund with the state treasurer," subject to the order of the Commissioner. Thereupon said bank shall be entitled to a certificate reciting that it is "guaranteed" as in said act provided.

By section 3 of said act it is further provided that the Bank Commissioner, during the month of January in each year, shall make assessments of one-twentieth of one per cent. on the average guaranteed deposits less capital and surplus of each bank, until the cash fund accumulated shall approximate $500,000 over and above the cash deposited in lieu of bonds. Should said fund become depleted the Bank Commissioners may make additional assessments, provided not more than five of such assessments of one-twentieth of one per cent. shall be made in any one calendar year, the said fund to be held by the state treasurer as by law provided, subject to the order of the Bank Commissioner.

By Section 4 of said act it is further provided that when any bank shall become insolvent the commissioner shall take charge of such bank and proceed to wind up its affairs, and at the earliest moment issue to each depositor a "certificate upon proof of claim bearing six per cent. interest per annum upon which dividends shall be entered when paid, except where a contract rate exists on the deposits, in which case the certificate shall bear interest at its contract rate." * * *

"After the officer in charge of the bank shall have realized upon the assets of said bank and exhausted the double liability of its stockholders, and shall have paid all funds so collected in dividends to the depositors, he shall certify all balances due on guaranteed deposits (if any exist) to the Bank Commissioner, who shall then, upon his approval of such certification, draw checks upon the state treasurer, to be countersigned by the Auditor of State, payable out of the bank depositors' guaranty fund in favor of each depositor for the balance due upon such proof of claim as hereinafter provided."

That under and by virtue of the provisions supra, the private depositors whose claims are guaranteed under said act are given a preferential claim over all other creditors of such insolvent bank in that all of the assets of the said Bank (including the liability
12 of stockholders) shall be applied, first, in payment of the claims of private depositors whose claims are guaranteed to the exclusion of any dividend upon the claims of other creditors; and furthermore such private depositors who are guaranteed under the provisions of this act, are entitled to have and receive the par

value of their said claims, plus interest thereon at the rate of six per cent, all to the exclusion of and in discrimination against all other creditors of such insolvent bank, and by reason whereof the said provisions in the said act impair the obligations existing between said bank and its other creditors whose claims are not so guaranteed, in violation of Section 10 of Article 1, of the Constitution of the United States, which prohibits any state from passing any "law impairing the obligations of contracts"; and in violation of the provision in Section 1 of Fourteenth Amendment of Constitution of United States which provides that no state shall "deny to any person within its jurisdiction the equal protection of the law."

That complainants, by reason of their business throughout the different parts of the State of Kansas, are necessarily required to and do have and make deposits with state banks in the state of Kansas, some of which have already gone into the guaranty system and in other banks, which, if the law be enforced, will be required to go into the said guaranty system, and that by reason of the premises if any of the said banks shall become insolvent, and their affairs wound up by the Bank Commissioner under said act, these complainants so having deposits in the said banks will be deprived of their lawful and constitutional right to share pro rata with other creditors in the assets of the said banks, and that their contracts with the said depositing banks will be impaired, in violation of the provision of Section 10 Article 1 of Constitution of the United States, and in violation of Section 1 Fourteenth Amendment of Constitution of the United States severally quoted supra.

VII.

That it is provided in Section 6 of the said Bank Guaranty Act of March 6, 1909, that the only claims which shall have the benefit of the said guaranty provisions are as follows: (*a*) Deposits which do not bear interest; (*b*) Time certificates not payable in less
13 than six months from date, and not exceeding more than one year, bearing interest not exceeding three per cent, and on which interest shall cease at maturity; (*c*) Savings accounts not exceeding in amount $100 to any one person and not subject to check, and upon which the bank has reserved in writing the right to require sixty days' notice of withdrawal and bearing interest not to exceed three per cent.

General deposits of private depositors for which the bank agrees to pay interest do not share in the guaranty provision; time certificates payable in less than six months do not share in the guaranty provision; certificates running for more than one year do not share in the guaranty provision; time certificates bearing interest at more than three per cent. per annum do not share in the guaranty provision; savings accounts in the amount of more than $100 to one person do not share in the guaranty provision; savings deposits, even though less than $100 to any one person, if the bank has not reserved in writing the right to require sixty days' notice of withdrawal, do not share in the guaranty provision; savings accounts which draw interest at a rate exceeding three per cent per annum

do not share in the guaranty provision, but all such deposits are discriminated against, and which said discrimination is arbitrary and without reason and is not based upon any classification which can be justified in either law or morals.

By said Section 6 deposits which are rediscounts and deposits which consist of money borrowed from other banks, and all deposits otherwise secured, shall not be guaranteed under said act, and none of which claims are entitled to share in the said guaranty fund, but to the contrary all of the creditors which fall within any of the excluded classes above enumerated are not entitled to share in any of the assets of an insolvent bank, nor in the stockholders' liability until after all of the guaranteed depositors' claims are first paid in full out of said assets and said stockholders' liability, and should the payment of such guaranteed claims exceed the entire assets of the bank and stockholders' liability, the other creditors above enumerated including complainants will receive no share whatsoever in the said assets of said insolvent bank, but are unlawfully discriminated against, and by reason of the premises said law is unconstitutional and void in that it impairs the contract obligations
14 between said depositors including complainants and the said insolvent bank, in violation of Section 10 Article 1 of the Constitution of the United States, above quoted, and deprives all of said creditors including complainants of property without due process of law, and denies to them the equal protection of the laws in violation of Section 1 of Fourteenth Amendment of Constitution of the United States.

In this connection complainants further aver that in the transaction of banking business it is necessary for banks to have, and they do have and complainants have moneys on deposit with banks which have already gone into the bank guaranty system, and with banks which have made application and intend to go into the bank guaranty system, and other banks which the defendants mean and intend to require and compel to go into the bank guaranty system; and it is necessary in the banking business in the state of Kansas for banks to borrow money temporarily from other banks, and to rediscount paper in other banks, including banks which have gone into the guaranty system, and banks which have made application and intend to go into the bank guaranty system, and in banks which the defendants intend to compel to go into the bank guaranty system, and all of which claims, credits loans and discounts, in law and morals, are entitled to be protected equally with other claims against any insolvent bank, and that by reason of the premises Section 6 of the said bank guaranty law creates an unlawful and unreasonable discrimination as between claims, creditors and banks, including complainants and deprives and impairs the obligations existing between them including complainants and such insolvent bank or banks in violation of Section 10 of Article 1 of the Constitution of the United States and denies to them the equal protection of the laws and deprives them including complainants of property without due process of law, in violation of Section 1 Fourteenth Amend-

ment of Constitution of United States, and by reason whereof said guaranty banking act is unconstitutional and void.

VIII.

It is provided in Section 7 of said bank guaranty law of March 6th, 1909, that "No bank which pays interest at a rate greater than three per cent. per annum on any form of deposit, or pays any interest on savings deposits withdrawn before July 1st or January 1st next following the date of the deposit, or on any time certificate before maturity shall be permitted to participate in the benefits of this act;" and which said provision is intended and will operate to deprive all of the supposed guaranteed depositors in any insolvent bank of the right or privilege to receive any benefit out of the said guaranty fund providing the bank in which there are such depositors shall at any time violate any of the provisions in the said paragraph of Section 7 above quoted. That said provision in said Section 7 of the said act gives to the defendant, Joseph N. Dolley, Bank Commissioner of the State of Kansas, arbitrary power and authority to deprive any bank of the benefits of said law, and of the guaranty provisions therein provided, and to deprive the guaranteed depositors in any such bank of the rights and privileges intended to be secured to them under said law, if such bank, after having accepted of the provisions of the law shall pay interest at a greater rate than three per cent. per annum upon any deposit, or shall pay interest on any savings deposit withdrawn before July 1st or January 1st next following, the date of the deposit, or shall pay interest on any time certificate which may be cashed before maturity, and that each and all of said provisions are unreasonable, unjust and arbitrary, and are not based upon any reasonable classification, and the provisions of said Section 7 of said act in their operation and effect destroy the obligations of the contract created between such banks as accept the provisions of the law, and the state of Kansas, and the contracts between such banks and their guaranteed depositors in violation of Section 10 of Article 1 of Constitution of the United States, which forbids any state passing a "law" impairing obligations of contracts and operates to deprive such banks and their depositors including complainants of property without due process of law, and denies to them the equal protection of the laws, in violation of Section 1 of Fourteenth Amendment of Constitution of the United States, and by reason of the premises said law is unconstitutional and void.

IX.

That the amount of the deposits required to be made with the state treasurer of the state of Kansas of either bonds or money, as provided in Section 2 of the said bank guaranty act, and of the guaranty assessments provided for and authorized to be made under section 2 and Section 3 of said Bank Guaranty act will as to each of the complainant banks in case they be held to be entitled to participate in said fund in law, exceed the sum or value of $2,000 exclusive of interest and costs.

That under said guaranty law the depositors in banks which have

not become guaranteed banks are not guaranteed while depositors in banks which have become guaranteed suppose themselves to be guaranteed and are led to believe by the state of Kansas and by said defendant Joseph N. Dolley as Bank Commissioner of the State of Kansas, that they are guaranteed and all banks which have become guaranteed banks are advertised by the state of Kansas and by the Bank Commissioner thereof as guaranteed banks; and the result of the enforcement of said law will be to either drive unguaranteed banks out of business and force them to liquidate and wind up their business, or to force banks which have not become guaranteed to make assessments on their stockholders for the purpose of raising a surplus fund, equal to 10% of their capital in case they have no such surplus fund and to cease to pay more than 3% interest on deposits of any kind and to relinquish many other valuable rights guaranteed to them by the constitution and laws of the state of Kansas and of the United States.

That of your orators the following have not a surplus fund equal to 10% of their capital stock, to-wit:

First National Bank of Bellaire, Union State Bank of Downs, Ford State Bank of Ford, Bank of Hamlin, Farmers & Merchants State Bank of Harper, State Bank of Home City, Iuka State Bank, Exchange Bank of Lenora, Peru State Bank, Peoples Bank of Pratt, South Haven Bank, Farmers State Bank of Whiting and Willis State Bank.

That said banks are authorized by all of the laws of the State of Kansas and of the United States to do a banking business without such 10% surplus and cannot legally compel their stockholders to submit to an assessment sufficient to create such a surplus. And said banks may not therefore share in the benefits of said law if any there be.

That the right of your orators and each of them to transact the banking business is of the value of more than $2,000 exclusive of interest and costs and the value of the rights which your orators would be compelled to surrender in order to become guaranteed banks under said law and in order to prevent the destruction of their business as above set forth is more than $2,000 exclusive of interest and costs.

17 X.

That the purpose, object and intent of the said Bank Guaranty Law is to take the property of each and all of the banks that accept of the provisions of said act, and to compel each and all of the banks which accept of the provisions of said act to set apart and deposit with and pay over to the Treasurer of the State of Kansas bonds, money and assessments, as in sections 2 and 3 of said act provided, and that the said bonds, money, and assessments shall be appropriated by said Joseph N. Dolley, Bank Commissioner, under the provisions of said act, in payment of the private claims of the class described as guaranteed deposits in some other bank which may become insolvent, and which appropriation and payment is a gratuity to such private claimants, as such depositors, and to

whom the contributing banks are under no obligation, contractual or otherwise, and which is a taking of the money and property of the contributing banks including complainants without due process of law, and is a denial to each of them of the equal protection of the law, in violation of section 1 of Fourteenth Amendment of Constitution of United States, and by reason whereof said Bank Guaranty Law is unconstitutional and void.

That when the stockholders in said complainant banks became the owners of the stock in said banks now owned by them, said banks had no power or right to embark their funds in any scheme for the guaranty of the payment of deposits in other banks and had no power or authority to risk their funds by entering into any such guaranty scheme, and that the right of said stockholders in said banks to have said banks continue in the banking business alone and to refrain from risking their funds in the insurance business was and is a valuable contract and property right, and that the said law purporting to authorize the investment of the funds of said banks in said guaranty scheme and the investment of said funds in said scheme impairs the contract rights of said stockholders and deprives said stockholders of property without due process of law, in that it lessens and diminishes the assets of said banks which give value to said stock, and takes the property of said stockholders to pay debts for which they are in no way liable without any benefit to them, and without relieving them in any way from their liability as stockholders.

18 XI.

That said Bank Guaranty Act in and of itself is unconstitutional and void, in that it creates unlawful and unreasonable discrimination in various and many particulars between state banks which may accept the provisions of said act and state banks which may not accept the provisions of said act, and arbitrarily classes said banks without reason in this: That state banks which pay more than three per cent interest per annum on deposits of any kind may not accept the provisions of said act, while state banks which do not pay more than three per cent interest per annum on deposits of any kind may accept the provisions of said act; and that state banks which have not a paid-up surplus equal to ten per cent of their capital stock may not accept the provisions of said act, while state banks which have such paid-up surplus may accept the provisions of said act; and that banks which have not been doing business for more than one year may not accept the provisions of said act, while state banks which have been doing business for more than one year may accept the provisions of said act, with the further arbitrary and unreasonable classification in this connection that state banks which have not been doing business for more than one year, but which are situated in cities in which all banks shall have neglected or failed to become guaranteed banks under the provisions of said act for a period of six months after the taking effect of this act, may accept the provisions of this act. That such classification of state banks is arbitrary and unreasonable and deprives

state banks which are not permitted to accept the provisions of said act of property without due process of law and of the equal protection of the laws, in violation of the provisions of section 1 of the Fourteenth Amendment to the constitution of the United States.

XII.

That said Bank Guaranty Act in and of itself is unconstitutional and void, in that it creates an unlawful and unreasonable discrimination in various and many particulars between banks which may and do accept its provisions, in this: That under said law banks which have equal deposits subject to guaranty but unequal capital and surplus are not subject to the same amount of assessment to protect the same amount of deposits, but that banks having the largest capital and surplus are required by said law to pay the smallest amount of assessment; and in this, that the minimum amount of bonds which may be deposited by any bank is $500 and that the minimum assessment that may be paid by any bank is twenty dollars and that banks having small amounts of deposits are required thereby to pay assessments on such amounts at a higher rate per cent than other banks. That such classification of said banks is unreasonable and arbitrary and denies certain of said banks *of* equal protection of the laws as above set forth, and deprives them of property without due process of law as above set forth—all contrary to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States.

XIII.

That said Bank Guaranty Act in and of itself is unconstitutional and void, in that it creates an unlawful and unreasonable discrimination in various and many particulars between the depositors of banks and those wishing to do business with banks, in this: That depositors whose deposits bear interest are not permitted to receive the benefits of said act, while depositors whose deposits do not bear interest are permitted to receive the benefits of said act; and that depositors whose deposits are represented by certificates not payable in less than six months and not extending for more than one year, bearing interest at not to exceed three per cent per annum and on which interest shall cease at maturity are entitled to the benefits of said act, while depositors whose deposits are represented by certificates for different terms or which bear interest at a greater rate than three per cent per annum are not entitled to the benefits of said act; and that depositors having savings accounts not exceeding in amount one hundred dollars and not subject to check, and upon which the bank has reserved in writing the right to require sixty days' notice of withdrawal, and bearing interest at not to exceed three per cent, are entitled to the benefits of said act, while depositors having savings accounts exceeding one hundred dollars in amount or which are subject to check or upon which the bank has nor reserved in writing the right to require sixty days' notice of withdrawal, or which bear interest at a greater rate than three per cent per annum, are not entitled to the benefits of said

act; and in this: That in case of insolvency depositors whose deposits by the terms of the contract of deposit do not bear interest are entitled to certificates upon proof of their claim, which certificates and the claim represented thereby shall bear interest at the rate of six per cent per annum, while depositors whose deposits by the contract of deposit bear interest at the rate of three per cent per annum or less are entitled in case of insolvency of the bank to certificate which bear interest only at said contract rate of three per cent per annum or less That such classification is arbitrary and unreasonable, and deprives certain of said depositors as above set forth of the equal protection of the laws and deprives them of property without due process of law, contrary to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States.

XIV.

That the effect of said bank guaranty act is to embark the State in the private business or pursuit of carrying on a mutual insurance company.

That said act requires the State Printer, at the expense of the state, to print and furnish forms and records to be used in carrying out said law, and requires the Bank Commissioner and his clerks and assistants and the State Treasurer and his clerks and assistants to employ the time for which they are paid by the State in carrying out the said law.

That there are more than 700 banks in the State of Kansas which are entitled to become guaranteed banks under said law, and that the carrying on of said mutual insurance scheme will be a great expense to the State which can be paid only by money raised by taxation.

21 That the State of Kansas and the Legislature thereof have no power to embark in the private business of insurance or to expend money of the State raised by taxation in carrying on mutual insurance companies and that all money used in the carrying out of said scheme will be taken from the taxpayers of the State of Kansas without due process of law, and the effect of said act will be to deprive the taxpayers of Kansas of property without due process of law.

That your orators, and their respective share-holders are tax payers & have paid large sums of money into the general revenue fund of the state on account of levies and assessments made against the real estate owned by your orators, and on account of their capital stock, and will be required to continue to make such payments, and that such funds have been and are being paid out by the defendants, and, unless enjoined, will continue to be paid out in connection with the operation and enforcement of said chapter 61, Laws of 1909. That the amount of taxation by reason of this law will not exceed $2000 as to any one bank complaining herein.

That said Bank Guaranty Law in its force and effect, and in its practical application, is intended to be and is unjustly and unlawfully discriminatory in favor of and in behalf of the banks which

shall accept of its provisions, and against all banks, State or National which shall not accept of its provisions.

That said law is in its very essence, fraudulent and promotive of fraud and deception. In its practical workings it gives depositors a false assurance, and persuades and tends to persuade them that they are guaranteed and secured when they are in fact not guaranteed or secured. It requires of the Bank Commissioner a certificate which is false and misleading, and which in its practical working, and especially because it emanates from the sovereign State tends to mislead and deceive the public as to the degree of security offered. It encourages, makes easy, and directly causes, false representations by so-called guaranteed banks, which banks are securing deposits by false signs and advertisements tending to persuade the public that their depositors are guaranteed by the State of Kansas and by an adequate special fund provided by the State of Kansas. Said act thus gives banks which accept its provisions, the right and power, under the guise and sanction of law, to obtain deposits by false and fraudulent representations; and by virtue of said law said banks are, as a matter of fact, so obtaining deposits to the great injury of banks honestly and fairly conducted.

That said law in its practical operation and effect (under and by virtue of the certificate which under the said act is to be issued by the Bank Commissioner to the banks which accept of the said guaranty provision) is intended to and will enable, authorize and empower the banks which accept the guaranty provisions to hold out to depositors and to the public that the depositors therein
22 are guaranteed, and that depositors in other banks are not so guaranteed, and all other banks are prohibited by the said law from giving out or advertising that their deposits are guaranteed, whereby and by reason whereof banks of small capitalization and otherwise insecure may induce and persuade citizens of the State of Kansas, and others, to deposit their money in said guaranteed banks in preference to making such deposits in banks not so guaranteed, and therein and thereby to wrongfully discriminate against and to deplete and diminish the deposits in banks not under the guaranteed system and to the advantage of the banks which are in the guaranteed system, and as against all banks which cannot, under the terms of the act, go into the said guaranty system, and including National banks, and as against trust companies which cannot go into the system; and by reason of the premises the said act is unconstitutional and void, in that it constitutes an unlawful and unreasonable discrimination in favor of certain banks as hereinbefore described, and as against other banks and trust companies as hereinbefore described, and is unconstitutional and void, being in violation of the provisions of section 1 of Fourteenth Amendment of Constitution of the United States hereinbefore more specifically pleaded.

The said Bank Guaranty Act in and of itself is unconstitutional and void, in that it creates an unlawful and unreasonable discrimination in various and many particulars between the banks which may accept of the provisions of said act and of the banks which do not or cannot accept of the provisions of said act, which discrimination

consists, among other things: (*a*) in the fact that the depositors in one class of banks have the privileges of the guaranty provision, while the depositors in other banks do not have such privileges; (*b*) that under said act certain banks of the State are prohibited from accepting of the provisions of the said act, while other banks, by reason of the manner of conducting their business, or in the judgment of the Bank Commissioner, may accept of the provisions of the said Bank Guaranty Act; (*c*) that as to the guaranteed banks their guaranteed depositors have a preferential claim over all other creditors, even to the absorption of all of the assets of the bank to the exclusion of other creditors, while as to banks not entering into the guaranty system all creditors share pro rata in the division
23 of the assets of the bank in case of insolvency; (*d*) that as to national banks the national banking act of the United States provides that all creditors of the bank shall share pro rata in the assets of the bank and the payment of the assets to depositors in preference to all other creditors is by the terms of the National Banking Act prohibited, and that the basis and purpose of the said Bank Guaranty Act is to create a preferential class of banks out of, from and among the banks of the state of Kansas, as appears in many particulars and provisions of the said act too numerous to herein recite or specifically mention, and as will more particularly appear in the said act; and that by reason whereof the said act is unconstitutional and void in that it deprives banks which do not, and banks which cannot, and trust companies which cannot accept of the provisions of the said act of the equal protection of the laws, in violation of the provisions to that effect, in Section 1 of Fourteenth Amendment of Constitution of United States.

XV.

That by Section 16 of the said Bank guaranty act it is provided "All acts and parts of acts in conflict with this act are hereby repealed in so far as they so conflict, but no provision of any banking law or other statute of this state shall be construed to be amended, modified or repealed, except in so far as necessary to permit the unrestricted operation of this act as applied to banks participating in the privileges of this act."

That no where in the said act is there any other provision relating to the amendment or repeal of any section or any part of the existing banking laws of the state of Kansas, and there is no way of determining what section or part of any section of the existing banking laws of the State of Kansas are thereby intended to be repealed or amended, nor what repeal or amendment of any section or part of the existing banking law shall be construed or determined to interfere with the unrestricted operation of said act, nor in how far any provision of the existing banking law shall be determined to be in conflict with the provision of said bank guaranty act, nor what section or part of any section or sections of the existing banking laws of the state of Kansas are in fact repealed or intended to be repealed, and that by reason whereof the

said bank guaranty law, in its entirety, is unconstitutional
24 and void, in that it is indefinite and uncertain as to sections repealed or amended, and is in conflict with various provisions of sections of the existing banking laws of the State of Kansas, and is in conflict with section 16 of Article 2 of the Constitution of the state of Kansas, and is unconstitutional and void in that it is in violation of the provisions of section 17 of Article 2 of the Constitution of the state of Kansas.

That in support of the averments in the different paragraphs of this bill contained, the said bank guaranty act is made part hereof and attached hereto as exhibit "A."

XVI.

Complainants further aver that all the sections of the said bank guaranty act hereinbefore referred to and complained of as being in violation of the provisions of the Constitution of the United States and of the provisions of the Constitution of the state of Kansas hereinbefore specifically mentioned, and section 13 which provides for the admission of national banks thereof are material and essential parts of the said act, and without which the said act would not have been passed by the legislature nor approved by the Governor of said state, and that by reasons of the premises the entire act is null and void, and in violation of the provisions of the Constitution of United States hereinbefore referred to, and is in violation of the provisions of the Constitution of the state of Kansas, hereinbefore referred to.

XVII.

Complainants further aver that the said defendants, Joseph N. Dolley, Bank Commissioner, and Mark Tulley, State Treas-
25 urer, are meaning and intending to enforce each and singular of the obligations and provisions of the said law and have already admitted a considerable number of state banks of the state of Kansas to the privileges granted under said law, and to that end have issued to certain banks certificates to that effect, and that the applications of other State banks are now pending before the Bank Commissioner for examination, and that the said Bank Commissioner threatens, means and intends to accept and receive the said application- and to issue to the said banks so applying certificates, as provided for in section 2 of said act, unless restrained and enjoined by the order of this court, all of which is and will be to the irreparable damage of the complainants herein, as hereinbefore more specifically appears, and that complainants are without adequate remedy at law in the premises.

Wherefore complainants pray your Honors for the granting of a temporary injunction enjoining and restraining the defendants, Joseph N. Dolley, Bank Commissioner of the state of Kansas, and Mark Tully, state treasurer of the state of Kansas, from proceeding to act under or enforce the said law of the legislature of the state of Kansas, approved March 6th, 1909, and that they be enjoined and restrained from receiving deposits of bonds or money, as in section

2 provided for, and from issuing certificates to any bank or banks, and from levying or causing to be levied any assessment under said act against any bank or banks, as in section 2 provided for, and that they be further enjoined and restrained from enforcing any of the provisions of the said act, and from attempting to exercise any powers or rights under the said act, and restrained and enjoined from interfering with the complainants by reason of their failure to make application to participate in the provisions of the said banking act.

And further pray, that upon the final hearing herein it shall be adjudged, decreed and determined that the said banking act, passed March 6th, 1909 of the state of Kansas be and is unconstitutional, null and void, as being in violation of the provisions of the Constitution of the United States and of the Constitution of the state of Kansas, for the reasons in that behalf in the bill of complaint set forth, and that such injunction be thereupon made perpetual, and for such other and further relief as the complainants may in equity and good conscience be entitled to in the premises.

26 May it please your Honors to grant unto these complainants a writ of subpœna of the United States of America, directed to Joseph N. Dolley, Bank Commissioner of the State of Kansas, and Mark Tulley State Treasurer of the State of Kansas, commanding them that on a certain day, and under a certain penalty therein to be specified, personally to be and appear in this Honorable court then and there to make full, true and complete answer to all and singular the averments, but not under oath or affirmation (an answer under oath or affirmation being hereby expressly waived), and to stand to and abide by such order and decree herein as this Honorable court shall deem meet and agreeable to equity and good conscience.

CHESTER I. LONG,
JOHN L. HUNT,
J. W. GLEED,
Solicitors for Complainant.

B. P. WAGGENER,
JOHN L. WEBSTER,
Of Counsel.

STATE OF KANSAS,
Shawnee County, ss:

J. W. Gleed, being first duly sworn on oath deposes and says: That he is one of the solicitors for said complainants and this affiant says that he has read the foregoing bill of complaint, knows the contents thereof, and that the allegations therein are true in fact, except as to such matters as are therein alleged to be stated upon information and belief, or by way of intendment, and as to such matters he believes the same to be true.

J. W. GLEED.

Subscribed and sworn to before me, a Notary Public in and for the county of Shawnee state of Kansas, this 13th day of September, 1909.

[SEAL.] L. D. STRICKLER,
Notary Public in and for the County of Shawnee, State of Kansas.

Com. Expires Sept. 26, 1911.

27 EXHIBIT A.

Bank Depositors' Guaranty Law.

[Senate Bill No. 549, Session of 1909.]

An Act providing for the security of depositors in the incorporated banks of Kansas, creating the bank depositors' guarantee fund of the State of Kansas, and providing regulations therefor, and penalties for the violation thereof.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Any incorporated state bank doing business in this State under the general banking laws of Kansas, having a paid-up and unimpaired surplus fund equal to ten per cent of its capital, and any bank which may after the passage of this act be authorized to do business in this State, and which shall have been actively engaged in the business of banking for at least one year, and having such surplus fund, is hereby authorized and empowered to participate in the assessments and benefits and to be governed by the regulations of the bank depositors' guaranty fund of the State of Kansas hereinafter provided for: *Provided*, That the limitation of one year shall not prevent such participation by a new bank at any time in any city or town in which all banks shall have neglected or failed to become guaranteed banks under the provisions of this act for a period of six months after the taking effect of this act. Before any bank shall become a guaranteed bank within the meaning of this act a resolution of its board of directors, authorized by its stockholders, duly certified by its president and secretary, asking therefor, in form to be provided by the Bank Commissioner, shall be filed with said Bank Commissioner, who shall, upon the filing of such resolution, make a rigid examination of the affairs of such bank, and if it is found to be solvent, to be properly managed and conducting its business in strict accordance with the banking law, he shall, after the bank shall have deposited with the State Treasurer bonds or money as hereinafter provided, issue to such bank a certificate stating in substance that said bank has complied with the provisions of this act, and that its depositors are guaranteed by the bank depositors' guaranty fund of the State of Kansas, as herein provided.

SEC. 2. Before receiving such certificate from the Bank Commissioner each bank entitled to the same according to section 1 of this act shall, as an evidence of good faith, deposit, and shall at all times

maintain with the State Treasurer (subject to the order of the Bank Commissioner when countersigned by the Auditor of State) United States bonds, Kansas State bonds, or the bonds of any county, township, school district, board of education or city within the State of Kansas, to the amount of five hundred dollars for every one hundred thousand dollars or fraction thereof of its average deposits eligible to guaranty (less its capital and surplus) as shown by its last four published statements: *Provided*, That each bank shall so deposit not less than five hundred dollars, and the State Treasurer shall issue his receipt therefor in triplicate, one to the bank, one to the Auditor of State, and one to the Bank Commissioner. Such bonds only shall be accepted as the School Fund Commissioners of the State of Kansas are permitted to buy, and shall bear the certificate of the Attorney-General of the State of Kansas stating that in his opinion said bonds have been
28 legally issued. Said bonds, or cash in lieu thereof, shall not be charged out of the assets of the bank, except as hereinafter provided, but shall be carried in its assets under a heading, "Guaranty Fund with State Treasurer," until such time as said bank shall default in payment of assessments hereinafter provided for. In lieu of bonds the bank, at its option, may deposit money, which deposit shall be exchangeable for acceptable bonds when the bank elects to make the substitution. In addition to above each bank shall pay in cash an amount equal to one-twentieth of one per cent of its average deposits eligible to guaranty, less its capital and surplus, and the same shall be credited to the bank depositors' guaranty fund with the State Treasurer, subject to the order of the Bank Commissioner, and the State Treasurer shall issue his receipt therefor in triplicate, one to the bank, one to the Auditor of State, and one to the Bank Commissioner: *Provided*, That the minimum assessment to be required from any bank shall be twenty dollars: *Provided further*, That any bank seeking to participate in the assessments and benefits of this act after the first annual assessment for the year 1910 shall have been made, shall be assessed an amount approximately equal to its proportionate share of the money then in the bank depositors' guaranty fund after all losses shall have been deducted, the amount of such assessment to be determined by the Bank Commissioner. The last above mentioned assessment, however, shall not be required of new banks formed by the reorganization or consolidation of banks which have previously complied with the terms of this act. Upon the deposit and acceptance of such bonds (or money) and the payment of said assessment, then the payment of such deposits of said bank as are specified in this act shall be guaranteed as herein provided, and the bank entitled to its certificate.

SEC. 3. The Bank Commissioner shall, during the month of January of each year, make assessment of one-twentieth of one per cent of the average guaranteed deposits, less capital and surplus, of each bank (the minimum assessment in any case to be twenty dollars), until the cash fund accumulated and placed to the credit of the bank depositors' guaranty fund shall be approximately five

hundred thousand dollars over and above the cash deposited in lieu of bonds, when he shall discontinue such assessments. Should such fund become depleted the Bank Commissioner shall make such additional assessments from time to time as may become necessary to maintain the same: *Provided*, That not more than five such assessments of one-twentieth of one per cent each shall be made in any one calendar year. The Treasurer of the State of Kansas shall hold this fund in the State Depository banks as provided by law governing other State funds, subject to the order of the Bank Commissioner, to be countersigned by the Auditor of State, for the payment of depositors of failed guaranteed banks, as hereinafter provided. The State Treasurer shall credit this fund quarterly with its proportionate share of interest received from State funds, computed at the minimum rate of interest provided by law, upon the average daily balance of said fund.

SEC. 4. When any bank shall be found to be insolvent by the Bank Commissioner he shall take charge of such bank as provided by law, and proceed to wind up its affairs; and shall, at the
29 earliest moment, issue to each depositor a certificate, upon proof of claim, bearing six per cent interest per annum, upon which dividends shall be entered when paid, except where a contract rate exists on the deposit, in which case the certificate shall bear interest at the contract rate; notice of the amount of each dividend to be paid creditors, and the date when such payment is to be made, shall be published in two consecutive issues of a paper of general circulation in the county or city in which such failed bank is located, and a corresponding notice posted on the door of the receiver's office, and interest shall cease on each dividend on the day named in such notice. The Bank Commissioner shall likewise publish a notice of the date upon which he will make payments of any balance due on such proof of claim, and interest shall cease on the day so advertised, and said proof of claim shall so state. After the officer in charge of the bank shall have realized upon the assets of such bank and exhausted the double liability of its stockholders, and shall have paid all funds so collected in dividends to the depositors, he shall certify all balances due on guaranteed deposits (if any exist) to the Bank Commissioner, who shall then, upon his approval of such certification, draw checks upon the State Treasurer, to be countersigned by the Auditor of State, payable out of the bank depositors' guaranty fund, in favor of each depositor for the balance due on such proof of claim as hereinafter provided. If at any time the available funds in the bank depositors' guaranty fund shall not be sufficient to pay all guaranteed deposits of any failed bank, the five assessments herein provided for having been made, the Bank Commissioner shall pay depositors *pro rata* and the remainder shall be paid when the next assessment is available: *Provided, however*, That whenever the Bank Commissioner shall have paid any dividends to the depositors of any failed bank out of the bank depositors' guaranty fund, then all claims and rights of action of such depositors so paid shall revert to the Bank Commissioner for the benefit of said bank depositors' guaranty fund, until said fund shall have been

fully reimbursed for payments made on account of such failed bank, with interest thereon at three per cent per annum.

SEC. 5. A penalty of fifty per cent of the amount of said assessment shall be added to the assessment of any bank not remitting as aforesaid within thirty days after receipt of notice of such assessment from the Bank Commissioner, and if any bank which shall have been assessed and notified as aforesaid shall fail to remit the amount of said assessment as herein provided, a sufficient amount of its bonds (together with the unexpired coupons) shall be immediately sold by the Bank Commissioner at public sale, and the proceeds used to pay said assessment. Any balance remaining from the proceeds of such sale after the payment of such assessment shall remain to the credit of the bank in the depositors' guaranty fund. The said balance, together with the remainder of the bonds (or cash in lieu thereof) shall be forfeited to the bank depositors' guaranty fund if the bank does not, within sixty days from default in payment of such assessment, remit the full amount of such assessments and penalty to date, and restore the amount of its bonds, or money pledged, as evidence of good faith. Upon the bank's failure to remit its assessments according to the terms of this act the Bank Commissioner shall immediately examine such bank, and if it is found in his judgment to be insolvent he shall take charge of and liquidate said bank according to law. If said bank be found solvent, the Bank Commissioner shall cancel its certificate as a guaranteed bank and cause to be displayed in its banking rooms, in a conspicuous place, continuously for six months, a card not smaller than twenty inches by thirty inches and in large, plain type, reading as follows: "This bank has withdrawn from the bank depositors' guaranty fund, and the guaranty of its deposits will cease on and after ——." The date on this card shall be a date six months after the first posting of such card. Any bank electing to withdraw from the bank depositors' guaranty fund may do so by giving notice to the Bank Commissioner and displaying a card as aforesaid, and at the expiration of the six months as aforesaid may receive its bonds (provided always that said bank shall have paid assessments in full to date) when the affairs of all failed banks in liquidation at the expiration of said six months shall have been closed up and the said bank shall have paid its assessments on account of same.

SEC. 6. Deposits which do not bear interest and the following deposits only shall be guaranteed by this act: Time certificates not payable in less than six months from date and not extending for more than one year, bearing interest at not to exceed three per cent per annum and on which interest shall cease at maturity; savings accounts not exceeding in amount one hundred dollars to any one person and not subject to check, upon which the bank has reserved in writing the right to require sixty days' notice of withdrawal, and bearing interest at not to exceed three per cent per annum. Deposits which are primarily rediscounts or money borrowed by the bank, and all deposits otherwise secured, shall not be guaranteed by this act. Each guaranteed bank shall certify under oath to the Bank Commissioner at the date of each called statement the amount

of money it has on deposit not eligible to guaranty under the provisions of this act, and in assessing such bank this amount shall be deducted from its total deposit. The guaranty as provided for in this act shall not apply to a bank's obligation as indorser upon bills rediscounted, nor to bills payable, nor to money borrowed temporarily from its correspondents or others.

SEC. 7. Each bank guaranteed by this act shall keep a correct record of the rate of interest paid or agreed to be paid to each depositor, and shall make a statement thereof under oath to the Bank Commissioner quarterly. If a bank displays a card or in any manner advertises that its depositors are guaranteed, such bank, if it pays or agrees to pay, either directly or indirectly, interest at any rate greater than three per cent per annum upon deposits of any kind, class or character, shall state upon or in the same card or advertisement that no deposits are guaranteed which bear a greater rate of interest per annum than three per cent; and this portion of the advertisement must be in type of the same size as that used in stating that the deposits of the bank are guaranteed. No bank which pays interest at a rate greater than three per cent per annum on any form of deposit, or pays any interest on savings deposits withdrawn before July 1st or January 1st next following the date of the
31 deposit, or on any time certificate cashed before maturity, shall be permitted to participate in the benefits of this act: *Provided, however*, That any existing contracts for higher rates of interest entered into before the passage of this act may be carried out unimpaired, and such existing contracts shall not disqualify a bank to participate in the benefits of this act. Any managing officer of any bank guaranteed under this act, or any person acting in its behalf or for its benefit, who shall hereafter pay or promise to pay any depositor, either directly or indirectly, any rate of interest in excess of or in addition to the maximum rate of interest permitted by this act, or who shall, with intent to evade any of the provisions of this act, pledge the time certificate or other obligation of such bank as security for the personal obligation of himself or any other person, shall be guilty of a misdemeanor punishable by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment not exceeding one year, or by both such fine and imprisonment. The display of any card or other advertisement tending to convey the impression that the deposits of the bank are guaranteed by the State of Kansas, either directly or indirectly, shall be a misdemeanor, and shall subject the offender to a fine of five hundred dollars; and any bank displaying a card or advertisement to the effect that its deposits are guaranteed by the bank depositors' guaranty fund of the State of Kansas, when not authorized so to do under the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than five hundred dollars nor more than one thousand dollars.

SEC. 8. Any trust company heretofore organized under the laws of this State, and now in operation, may reorganize as a State bank under the laws of this State by filing with the Secretary of State an

amended charter signifying such purpose, to be approved by the Charter Board; and any private bank or national bank having the required capital and being otherwise qualified, may reorganize as a State bank; or any newly organized bank taking over the business of another bank, otherwise qualified, may immediately become a guaranteed bank by depositing bonds or money and paying its assessments and otherwise complying with the provisions of this act.

SEC. 9. A solvent bank, upon retiring from business and liquidating its affairs, shall be entitled to receive back from the State Treasurer, after all the depositors in such bank have been paid in full, its bonds or money pledged, but not any part of any unused assessment that may be in the bank depositors' guaranty fund: *Provided, however*, That should such bank be turning over its business to another bank it shall not receive back its bonds or money, deposited in lieu thereof, until the bank receiving its business shall have deposited with the State Treasurer bonds, or money in lieu thereof, according to the requirements of this act.

SEC. 10. Banks may be permitted, in the discretion of the Bank Commissioner, to exchange their bonds for others acceptable under this act, or be allowed to deposit in lieu thereof an equal amount in cash, which may in turn be withdrawn upon the substitution of bonds acceptable under this act.

32 SEC. 11. If at any regular or special examination of a guaranteed bank it shall be found to be violating any of the provisions of this act, the Bank Commissioner shall notify the bank, and the bank may be given thirty days in which to comply with the provisions of this act; and if at the expiration of this time such provisions have not been complied with the Bank Commissioner shall cancel its certificate of membership in the bank depositors' guaranty fund as herein provided, and forfeit its bonds deposited with the State Treasurer for the benefit of the bank depositors' guaranty fund.

SEC. 12. All bonds, and moneys deposited in lieu of bonds, placed in the State Treasury under this act, shall be kept in said treasury separate from all other bonds and moneys and to the credit of the bond account of the Bank depositors' guaranty fund, and shall be used for no other purpose. The State Treasurer shall cause the coupons upon the said bonds to be cut thirty days before maturity and sent or delivered to the bank which deposited them: *Provided, always*, That said bank shall have paid all assessments in full to date.

SEC. 13. After the passage of this act any National bank doing business in the State of Kansas, under the laws of the United States, after an examination at its expense by the State Bank Commissioner, and upon his approval as to its financial condition, may at its option participate in the assessments and benefits of the bank depositors' guaranty fund of the State of Kansas upon the same terms and conditions as apply to State banks: *Provided*, That such National bank shall forward to the Bank Commissioner of the State of Kansas detailed reports, in form to be provided by him, of its condition on the dates of the usual called statements of State banks (such

report not to be published except at the option of the bank), and shall submit to one examination each year by his department (or oftener in his discretion) as provided by the banking laws of the State of Kansas, and pay the usual fee therefor. Should a National bank disregard or refuse to comply with any recommendation made by the Bank Commissioner, in conformity with the provisions of this act, it shall immediately be subject to the provisions and penalties of this act and its certificate of membership in the bank depositors' guaranty fund shall be canceled.

SEC. 14. It shall be unlawful for any bank guaranteed under the provisions of this act to receive deposits continuously for six months in excess of ten times its paid-up capital and surplus, and the violation of this section by any bank shall cancel its rights to participate in the benefits of the bank depositors' guaranty fund, and work a forfeiture of its bonds deposited with the State Treasurer for the benefit of such fund.

SEC. 15. For the purpose of carrying into effect the provisions of this act the Bank Commissioner shall provide forms and make requisition on the State Printer for the necessary blanks, and all reports received by the Bank Commissioner shall be preserved by him in his office. The State Treasurer is authorized to provide forms and make requisition on the State Printer for the necessary blanks and record books for his office.

33 SEC. 16. All acts and parts of acts in conflict with this act are hereby repealed in so far as they so conflict, but no provision of any banking law or other statute of this State shall be construed to be amended, modified or repealed, except in so far as necessary to permit the unrestricted operation of this act as applied to banks participating in the privileges of this act.

SEC. 17. This act shall take effect and be in force from and after June 30, 1909, and its publication in the official State paper.

Approved March 6, 1909.

Endorsed: No. 8816. In the Circuit Court of United States, Dist. of Kansas, 1st Div. Assaria State Bank et al., Complainants, vs. Joseph N. Dolley as Bank Commissioner et al., Defendants. Bill of Complaint. Filed this 14" day of September, 1909. Geo. F. Sharitt, Clerk.

34 *Chancery Subpœna.*

UNITED STATES OF AMERICA,
District of Kansas, ss:

The United States of America to Joseph N. Dolley as Bank Commissioners of the State of Kansas, and Mark Tulley as State Treasurer of the State of Kansas, Greeting:

We command you and every of you, that you appear before our Judge of our Circuit Court of the United States of America for the District of Kansas, First Division, at the City of Topeka, in said District, on the first Monday in the month of November, next,

to answer the Bill of Complaint of Assaria State Bank of Assaria, et al., this day filed in the Clerk's office of said Court in said City of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the District of Kansas to Execute.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the City of Topeka, in said District, this 14" day of September in the year of our Lord one thousand nine hundred and nine.

[SEAL.] GEO. F. SHARITT, *Clerk*.

MEMORANDUM.—The above named defendants are notified that unless they enter their appearance in the Clerk's office of said Court, at the City of Topeka aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

GEO. F. SHARITT, *Clerk*.

35 *U. S. Marshal's Return.*

DISTRICT OF KANSAS, *ss:*

Received the within writ September the 14", 1909, and executed the same as follows, to wit: Served on the within named Mark Tulley, as State Treasurer of the State of Kansas, personally, by delivering a true and certified copy of this writ, with all endorsements thereon, at Topeka, Kansas on the 14th day of September, 1909. Upon the within named Joseph N. Dolley, as Bank Commissioner of the State of Kansas, personally by delivering a true and certified copy of this writ with all endorsements thereon at Topeka, Kansas on the 20th day of September, 1909.

Fees: $4.00.

WILLIAM H. MACKEY, JR.,
U. S. Marshal,
By E. M. BIRCH, *Deputy*.

[Endorsed:] No. 8816. Circuit Court United States, District of Kansas. Assaria State Bank of Assaria et al., vs. Joseph N. Dolley as Bank Commissioner, et al. Chancery Subpœna. Returnable to rule day, first Monday in November, A. D. 1909. Geo. F. Sharitt, Clerk. —— ——, Deputy Clerk. Filed Sept. 21, A. D. 1909. Geo. F. Sharitt, Clerk. —— ——, Deputy Clerk. Chester I. Long, John L. Hunt, J. W. Gleed, B. P. Waggener, John L. Webster, Compl't's Sols.

36 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8816.

ASSARIA STATE BANK OF ASSARIA (and Forty-six Other State Banks), Complainants,

vs.

J. N. DOLLEY, as Bank Commissioner of the State of Kansas, and Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

Demurrer.

The demurrer of the above named defendants, J. N. Dolley, Bank Commissioner, and Mark Tulley, as State Treasurer, to the bill of the complainants: The defendants by protestation not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained, to be true in such manner and form as the same are therein set forth and alleged, jointly demur to the said bill and for causes of demurrer show:

I.

That the said plaintiffs have not shown by said bill that they or either of them have any right or interest in the subject of the suit, the relief demanded, or the controversy attempted to be alleged which would entitle them or either of them to the relief prayed for therein.

II.

That enough does not appear upon the face of the bill to show the court's jurisdiction of the suit in consequence of the amount involved exceeding the sum of two thousand (2,000) dollars exclusive of interest and costs, and said bill does not affirmatively show that either of said complainants have an interest amounting to the sum of two thousand (2,000) dollars exclusive of interest and costs therein, because said bill affirmatively shows that neither of the said complainants has an interest in the alleged controversy exceeding the said sum of two thousand (2,000) dollars exclusive of interest and costs.

37 That it appeareth by the plaintiffs' own showing in the said bill that they and each of them are not entitled to any relief in the bill against these defendants or any of them alleged and for divers good causes of demurrer which appear on the said bill these defendants do demur to, and they pray judgment of the court whether they or any of them shall be compelled to make any answer to the said bill and they humbly pray to be dismissed with their reasonable costs in their behalf sustained.

F. S. JACKSON, *Att'y Gen'l.*
G. H. BUCKMAN &
A. C. MITCHELL,
Solicitors of Counsel for Defendants
J. N. Dolley and Mark Tulley.

Certificate of Counsel.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law and it is not interposed for delay, and that the same is true in point of fact.

F. S. JACKSON,
G. H. BUCKMAN &
A. C. MITCHELL,
Solicitors for Defendants.

Endorsed: No. 8816. Assaria State Bank et al. vs. J. N. Dolley et al. Demurrer to Bill. Filed Sept. 29, 1909. Geo. F. Sharitt. Clerk.

38 In the United States Circuit Court for the District of Kansas, First Division, Sitting at Topeka.

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THE ASSARIA STATE BANK, et al., Complainants.
vs.
JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas, and Mark Tully, as State Treasurer of the State of Kansas, Defendants.

To Geo. F. Sharitt, Clerk of the United States Circuit Court for the District of Kansas:—

Please enter the appearance of Joseph N. Dolley, as Bank Commissioner of the State of Kansas, and of Mark Tully, as State Treasurer of the State of Kansas, and please enter our appearance as solicitors for the said Joseph N. Dolley as Bank Commissioner, and Mark Tully as State Treasurer of the State of Kansas in the above entitled suit.

Dated this 28th day of September, 1909.

GEO. H. BUCKMAN,
A. C. MITCHELL,
FRED S. JACKSON,
Solicitors and Counsel for Joseph N. Dolley, as Bank Commissioner, and Mark Tully as State Treasurer of the State of Kansas.

Endorsed: No. 8816. Assaria State Bank, et al. vs. Joseph N. Dolley et al. Appearance. Filed Sept. 29, 1909. Geo F. Sharitt, Clerk.

39 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8816.

ASSARIA STATE BANK OF ASSARIA, et al., Complainants,
vs.
JOSEPH N. DOLLEY, as Bank Commissioner, et al., Defendants.

Order.

Now, on this 29th day of September, 1909, this cause comes on to be heard upon the bill of complaint of the complainants herein as amended, and upon the application of the said complainants for a temporary injunction as prayed for in said bill and upon the demurrer of said defendants to said bill of complaint as amended.

Ordered, that defendants have leave to file their brief herein within ten days from and after this date and that both complainants and defendants have leave to file their additional briefs herein within twenty days from and after this date and that said cause stand as so submitted for final decree herein.

JOHN C. POLLOCK, *Judge.*

GEO. H. BUCKMAN,
A. C. MITCHELL,
F. S. JACKSON,
Solicitors for Def'ts.
J. W. GLEED,
Solicitor for Compl't.

Endorsed: — 8816. Order submitting case. Filed Sept. 29, 1909. Geo. F. Sharitt, clerk.

40 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8816.

ASSARIA STATE BANK OF ASSARIA, (and Forty-six Other State Banks), Complainants,
v.
J. N. DOLLEY, as Bank Commissioner of the State of Kansas, and Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

Order.

Now, on this 18th day of October, 1909, on motion of said complainants it is by the court

Ordered, that said complainants be and they are hereby allowed

until and including the 29th day of October, 1909, in which to file further briefs herein.

JOHN C. POLLOCK, *Judge.*

Endorsed: — 8816. Order extending time for briefs. Filed Oct. 18, 1909. Geo. F. Sharitt, clerk.

41 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8810. Equity.

FRANK S. LARABEE, Complainant,
v.
J. N. DOLLEY, as Bank Commissioner of the State of Kansas, et al., Defendants.

No. 8816. Equity.

ASSARIA STATE BANK OF ASSARIA, Kansas, et al., Complainants,
v.
J. N. DOLLEY, as Bank Commissioner of the State of Kansas, et al., Defendants.

No. 8817. Equity.

ABILENE NATIONAL BANK OF ABILENE, Kansas, et al., Complainants,
v.
J. N. DOLLEY, as Bank Commissioner of the State of Kansas, et al., Defendants.

Memorandum of Decision on Demurrers to Bills of Complaint.

Separate bills of complaint have been presented in the above entitled and numbered cases calling in question the constitutional validity of an act of the legislature of this state (Chapter 61, Laws of 1909) commonly known as the Bank Guaranty law of the state. By that act it is provided, as follows:

"An act providing for the security of depositors in the incorporated banks of Kansas, creating the bank depositors guaranty fund of the state of Kansas, and providing regulations therefor, and penalties for the violation thereof.

Be it enacted by the Legislature of the State of Kansas:

"SECTION 1. Any incorporated state bank doing business in this state under the general banking laws of Kansas, having a
42 paid-up and unimpaired surplus fund equal to ten per cent. of its capital, and any bank which may after the passage of this act be authorized to do business in this state, and which shall have been actively engaged in the business of banking, for at least

one year, and having such surplus fund, is hereby authorized and empowered to participate in the assessments and benefits and to be governed by the regulations of the bank depositors' guaranty fund of the state of Kansas hereinafter provided for; provided, that the limitation of one year shall not prevent such participation by a new bank at any time in any city or town in which all banks shall have neglected or failed to become guaranteed banks under the provisions of this act for a period of six months after the taking effect of this act. Before any bank shall become a guaranteed bank within the meaning of this act a resolution of its board of directors, authorized by its stockholders, duly certified by its president and secretary, asking therefor, in form to be provided by the bank commissioners, shall be filed with said bank commissioner, who shall upon the filing of such resolution, make a rigid examination of the affairs of such bank, and if it is found to be solvent, to be properly managed and conducting its business in strict accordance with the banking law, he shall, after the bank shall have deposited with the state treasurer bonds or money as hereinafter provided, issue to such bank a certificate stating in substance that said bank has complied with the provisions of this act, and that its depositors are guaranteed by the bank depositors' guaranty fund of the state of Kansas, as herein provided.

"SEC. 2. Before receiving such certificate from the bank commissioner, each bank entitled to the same according to section 1 of this act, shall as an evidence of good faith, deposit, and shall at all times maintain with the state treasurer (subject to the order of the bank commissioner when countersigned by the auditor of state) United States bonds, Kansas state bonds, or the bonds of any county, township, school district, board of education or city within the state of Kansas, to the amount of five hundred dollars for every one hundred thousand dollars or fraction thereof of its average deposits eligible to guaranty (less its capital and surplus) as shown by its last
43 four published statements; provided, that each bank shall so deposit not less than five hundred dollars, and the state treasurer shall issue his receipt therefor in triplicate, one to the bank, one to the auditor of state, and one to the bank commissioner. Such bonds only shall be accepted as the school fund commissioners of the state of Kansas are permitted to buy, and shall bear the certificate of the attorney-general of the state of Kansas stating that in his opinion said bonds have been legally issued. Said bonds, or cash in lieu thereof, shall not be charged out of the assets of the bank, except as hereinafter provided, but shall be carried in its assets under a heading "Guaranty Fund with State Treasurer" until such time as said bank shall default in payment of assessments hereinafter provided for. In lieu of bonds the bank at its option, may deposit money, which deposits shall be exchangeable for acceptable bonds when the bank elects to make the substitution. In addition to above each bank shall pay in cash an amount equal to one-twentieth of one per cent. of its average deposits eligible to guaranty, less its capital and surplus, and the same shall be credited to the bank depositors' guaranty fund with the state treasurer subject to the order of the bank commissioner, and the state treasurer shall issue his re-

ceipt therefor in triplicate, one to the bank, one to the auditor of state, and one to the bank commissioner; provided, that the minimum assessment to be required from any bank shall be twenty dollars; provided further, that any bank seeking to participate in the assessments and benefits of this act after the first annual assessment for the year 1910 shall have been made, shall be assessed an amount approximately equal to its proportionate share of the money then in the bank depositors' guaranty fund after all losses shall have been deducted, the amount of such assessment to be determined by the bank commissioner. The last above mentioned assessment, however, shall not be required of new banks formed by the reorganization or consolidation of banks which have previously complied with the terms of this act. Upon the deposit and acceptance of such bonds (or money) and the payment of said assessment, then the payment of such deposits of said bank as are specified in this act shall be guaranteed as herein provided, and the bank entitled to its certificate.

"SEC. 3. The bank commissioner shall, during the month
44 of January of each year, make assessments of one-twentieth of one per cent. of the average guaranteed deposits, less capital and surplus, of each bank (the minimum assessment in any case to be twenty dollars) until the cash fund accumulated and placed to the credit of the bank depositors' guaranty fund shall be approximately five hundred thousand dollars over and above the cash deposited in lieu of bonds, when he shall discontinue such assessments. Should such fund become depleted the bank commissioner shall make such additional assessments from time to time as may become necessary to maintain the same; provided, that not more than five such assessments of one-twentieth of one per cent. each shall be made in any one calendar year. The treasurer of the state of Kansas shall hold this fund in the state depository banks as provided by law governing other state funds, subject to the order of the bank commissioner to be countersigned by the auditor of state, for the payment of depositors of failed guaranteed banks, as hereinafter provided. The state treasurer shall credit this fund quarterly with its proportionate share of interest received from state funds, computed at the minimum rate of interest provided by law, upon the average daily balance of said fund.

"SEC. 4. When any bank shall be found to be insolvent by the bank commissioner he shall take charge of such bank, as provided by law, and proceed to wind up its affairs; and he shall, at the earliest moment, issue to each depositor a certificate, upon proof of claim, bearing six per cent. interest per annum upon which dividends shall be entered when paid, except where a contract rate exists on the deposit, in which case the certificate shall bear interest at the contract rate, notice of the amount of each dividend to be paid creditors and the date when such payment is to be made shall be published in two consecutive issues of a paper of general circulation in the county or city in which such failed bank is located, and a corresponding notice posted on the door of the receiver's office, and interest shall cease on each dividend on the day named in such notice. The bank commissioner shall likewise publish a notice of

the date upon which he will make payments of any balance due on such proof of claim, and interest shall cease on the day so
45 advertised, and said proof of claim shall so state. After the officer in charge of the bank shall have realized upon the assets of such bank, and exhausted the double liability of its stockholders, and shall have paid all funds so collected in dividends to the depositors, he shall certify all balances due on guaranteed deposits (if any exist) to the bank commissioner who shall then, upon his approval of such certification, draw checks upon the state treasurer, to be counter-signed by the auditor of state, payable out of the bank depositors' guaranty fund, in favor of each depositor for the balance due on such proof of claim as hereinafter provided. If at any time the available funds in the bank depositors' guaranty fund shall not be sufficient to pay all guaranteed deposits of any failed bank, the five assessments herein provided for having been made, the bank commissioner shall pay depositors *pro rata* and the remainder shall be paid when the next assessment is available; provided, however, that whenever the bank commissioner shall have paid any dividend to the depositors of any failed bank out of the bank depositors' guaranty fund, then all claims and rights of action of such depositors so paid shall revert to the bank commissioner for the benefit of said bank depositors' guaranty fund, until said fund shall have been fully reimbursed for payments made on account of such failed bank, with interest thereon at three per cent. per annum.

"SEC. 5. A penalty of fifty per cent. of the amount of said assessment shall be added to the assessment of any bank not remitting as aforesaid within thirty days after receipt of notice of such assessment from the bank commissioner, and if any bank which shall have been assessed and notified as aforesaid shall fail to remit the amount of said assessment as herein provided, a sufficient amount of its bonds (together with the unexpired coupons) shall be immediately sold by the bank commissioner at public sale and the proceeds used to pay said assessment. Any balance remaining from the proceeds of such sale after the payment of such assessment shall remain to the credit of the bank in the depositor's guaranty fund. The said balance, together with the remainder of the bonds (or cash in lieu thereof) shall be forfeited to the bank depositors' guaranty fund if the bank does not, within sixty days from default in payment of such assessment, remit the full amount of such
46 assessments and penalty to date, and restore the amount of its bonds, or money pledged, as evidence of good faith. Upon the bank's failure to remit its assessments according to the terms of this act the bank commissioner shall immediately examine such bank, and if it is found in his judgment to be insolvent he shall take charge of and liquidate said bank according to law. If said bank be found solvent the bank commissioner shall cancel its certificate as a guaranteed bank and cause to be displayed in its banking rooms, in a conspicuous place, continuously for six months, a card not smaller than twenty inches by thirty inches and in large, plain type, reading as follows: "This bank has withdrawn from

the bank depositors' guaranty fund and the guaranty of its deposits will cease on and after ——." The date on this card shall be a date six months after the first posting of such card. Any bank electing to withdraw from the bank depositors' guaranty fund may do so by giving notice to the bank commissioner and displaying a card as aforesaid, and at the expiration of the six months as aforesaid may receive its bonds (provided always that said bank shall have paid assessments in full to date) when the affairs of all failed banks in liquidation at the expiration of said six months shall have been closed up and the said bank shall have paid its assessments on account of same.

"SEC. 6. Deposits which do not bear interest and the following deposits only shall be guaranteed by this act: Time certificates not payable in less than six months from date and not extending for more than one year, bearing interest at not to exceed three per cent. per annum and on which interest shall cease at maturity; saving accounts not exceeding in amount one hundred dollars to any one person and not subject to check, upon which the bank has reserved in writing the right to require sixty days' notice of withdrawal and bearing interest at not to exceed three per cent. per annum. Deposits which are primarily rediscounts or money borrowed by the bank, and all deposits otherwise secured shall not be guaranteed by this act. Each guaranteed bank shall certify under oath to the bank commissioner at the date of each called statement the amount of money it has on deposit not eligible to guaranty under the provisions of this act, and in assessing such bank this amount
47 shall be deducted from its total deposit. The guaranty as provided for in this act shall not apply to a bank's obligation as indorser upon bills rediscounted, nor to bills payable, nor moneys borrowed temporarily from its correspondents or others.

"SEC. 7. Each bank guaranteed by this act shall keep a correct record of the rate of interest paid or agreed to be paid to each depositor, and shall make a statement thereof under oath to the bank commissioner quarterly. If a bank displays a card or in any manner advertizes that its depositors are guaranteed, such bank, if it pays or agrees to pay, either directly or indirectly, interest at any rate greater than three per cent per annum upon deposits of any kind, class, or character, shall state upon or in the same card or advertisement that no deposits are guaranteed which bear a greater rate of interest per annum than three per cent; and this portion of the advertisement must be in type of the same size as that used in stating that the deposits in the bank are guaranteed. No bank which pays interest at a rate greater than three per cent. per annum on any form of deposit, or pays any interest on savings deposits withdrawn before July 1 or January 1 next following the date of the deposit or on any time certificate cashed before maturity, shall be permitted to participate in the benefits of this act; provided, however, that any existing contracts for higher rates of interest entered into before the passage of this act may be carried out unimpaired, and such existing contracts shall not disqualify a bank to participate in the benefits of this act. Any managing officer of any bank guaranteed under this

act, or any person acting in its behalf or for its benefit, who shall hereafter pay or promise to pay any depositor, either directly or indirectly, any rate of interest in excess of or in addition to the maximum rate of interest permitted by this act, or who shall, with intent to evade any of the provisions of this act, pledge the time certificate or other obligation of such bank as security for the personal obligation of himself or any other person, shall be guilty of a misdemeanor punishable by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment not exceeding one year, or by both such fine and imprisonment. The dis-
48 play of any card or other advertisement tending to convey the impression that the deposits of the bank are guaranteed by the state of Kansas, either directly or indirectly, shall be a misdemeanor and shall subject the offender to a fine of five hundred dollars and any bank displaying a card or advertisement to the effect that its deposits are guaranteed by the bank depositors' guaranty fund of the state of Kansas when not authorized so to do under the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than five hundred dollars nor more than one thousand dollars.

"SEC. 8. Any trust company heretofore organized under the laws of this state, and now in operation, may reorganize as a state bank under the laws of this state by filing with the secretary of state an amended charter signifying such purpose, to be approved by the Charter Board; and any private bank or national bank having the required capital and being otherwise qualified, may reorganize as a state bank; or any newly organized bank taking over the business of another bank, otherwise qualified, may immediately become a guaranteed bank by depositing bonds or money and paying its assessments and otherwise complying with the provisions of this act.

"SEC. 9. A solvent bank, upon retiring from business and liquidating its affairs, shall be entitled to receive back from the state treasurer, after all the depositors in such bank have been paid in full, its bonds or money pledged, but not any part of any unused assessment that may be in the bank depositors' guaranty fund; provided, however, that should such bank be turning over its business to another bank it shall not receive back its bonds, or money deposited in lieu thereof, until the bank receiving its business shall have deposited with the state treasurer bonds, or money in lieu thereof, according to the requirements of this act.

"SEC. 10. Bank- may be permitted in the discretion of the Bank commissioner, to exchange their bonds for others acceptable under this act, or be allowed to deposit in lieu thereof an equal amount in cash which may in turn be withdrawn upon the substitution of bonds acceptable under this act.

"SEC. 11. If at any regular or special examination of a guaranteed bank it shall be found to be violating any of the provisions of
49 this act the bank commissioner shall notify the bank, and the bank may be given thirty days in which to comply with the provisions of this act; and if at the expiration of this time such provisions have not been complied with the bank commissioner shall

cancel its certificate of membership in the bank depositors' guaranty fund as herein provided and forfeit its bonds deposited with the state treasurer for the benefit of the bank depositors' fund.

"SEC. 12. All bonds, and moneys deposited in lieu of bonds, placed in the state treasury under this act shall be kept in said treasury separate from all other bonds and moneys and to the credit of the bond account of the bank depositors' guaranty fund, and shall be used for no other purpose. The state treasurer shall cause the coupons upon the said bonds to be cut thirty days before maturity and sent or delivered to the bank which deposited them; provided, always, that said bank shall have paid all assessments in full to date.

"SEC. 13. After the passage of this act any national bank doing business in the state of Kansas, under the laws of the United States, after an examination at its expense by the state bank commissioner, and upon his approval as to its financial condition, may at its option participate in the assessments and benefits of the bank depositors' guaranty fund of the state of Kansas upon the same terms and conditions as apply to state banks; provided, that such national bank shall forward to the bank commissioner of the state of Kansas detailed reports, in form to be provided by him, of its condition on the dates of the usual called statements of state banks (such report not to be published except at the option of the bank) and shall submit to one examination each year by his department (or oftener in his discretion) as provided by the banking laws of the state of Kansas, and pay the usual fees therefor. Should a national bank disregard or refuse to comply with any recommendation made by the bank commissioner, in conformity with the provisions of this act, it shall immediately be subject to the provisions and penalties of this act, and its certificate of membership in the bank depositors' guaranty fund shall be canceled.

"SEC. 14. It shall be unlawful for any bank guaranteed under the provisions of this act to receive deposits continuously for six months in excess of ten times its paid up capital and surplus, and the violation of this section by any bank shall cancel its rights to participate in the benefits of the bank depositors' guaranty fund, and work a forfeiture of its bonds deposited with the state treasurer for the benefit of such fund.

"SEC. 15. For the purpose of carrying into effect the provisions of this act the bank commissioner shall provide forms and make requisition on the state printer for the necessary blanks, and all reports received by the bank commissioner shall be preserved by him in his office. The state treasurer is authorized to provide forms and make requisition on the state printer for the necessary blanks and record-books for his office.

"SEC. 16. All acts and parts of acts in conflict with this act are hereby repealed in so far as they so conflict, but no provision of any banking law or other statute of this state shall be construed to be amended, modified or repealed except in so far as necessary to permit the unrestricted operation of this act as applied to banks participating in the privileges of this act.

"SEC. 17. This act shall take effect and be in force from and after June 30, 1909, and its publication in the official state paper."

To the form and manner of the matters averred in the several bills of complaint so presented, no exceptions have been taken by defendants. On the contrary, general demurrers have been interposed thereto challenging the sufficiency of the averments (1) to confer jurisdiction on this court; (2) to entitle complainants to the relief prayed.

The consideration of the questions presented renders necessary a statement of the facts averred in the several bills of complaint touching the relation of complainants to, and their interest in the subject-matter of the controversy presented. For as complainants and defendants in the several cases are each and all citizens of this state, to confer jurisdiction on this court, the cases must (1) arise under the Constitution and laws of the national government; (2) must involve property rights of sufficient amount to confer jurisdiction on this court, else the demurrers must be sustained.

51 In considering the facts averred in the several bills of complaint for the purpose of testing their legal sufficiency as against the demurrers, it is clear only such matters as may be regarded as well pleaded may be accepted as admitted. Dillon v. Barnard, 21 Wall. 430; United States v. Ames, 99 U. S. 35; Interstate Land Co. v. Maxwell Land Grant Co., 139 U. S. 569; Chicot v. Sherwood, 148 U. S. 536; Equitable Life Assurance Society v. Brown 213 U. S. 25. In conformity with this rule the relation of complainants to, and their interest in the subject-matter of the controversy presented by the several bills of complaint may be briefly summarized as follows:

Complainant in case No. 8810, Frank S. Larabee, a minority stockholder in the State Exchange Bank of the city of Hutchinson, this state (hereinafter called the "Bank") and the owner of twenty shares therein of the par value of one hundred dollars each, and of the actual value of thirty-five hundred dollars, presents his bill against the bank commissioner and treasurer of the state, whose duties are prescribed in and defined by the terms of the act, also, against the Bank in which he is a shareholder.

It is averred, prior to the institution of this suit over the protest and objection of complainant, a majority of the shareholders in the bank had voted authorizing its board of directors to accept the provisions of the act, and in pursuance of such authority the board of directors had by resolution, duly certified, as provided in Section 1 of the act, declared the intention to accept the terms and conditions of the act. That the capital stock of the Bank is two hundred thousand dollars. That in complaince with the provisions of the act the Bank had deposited with defendant, the treasurer of the state, the sum of one thousand dollars in lieu of that amount of bonds, and had also deposited with the treasurer the further sum of $84.56, the same being one-twentieth of one per cent. of its average deposits eligible to guaranty, less its capital and surplus. It is further averred the amount which the Bank, by accepting the provisions of the act, will

become liable to pay thereunder, is more than two thousand
52 dollars. That unless restrained defendants, as treasurer and bank commissioner of the state, will devote the funds of the Bank pledged and required to be pledged to carrying out the provisions of the act, and will enforce all and singular the provisions and obligations of the act against the bank. That defendant Dolley, as bank commissioner, will accept the Bank as eligible to certification under the law, and that the Bank will accept its provisions and obligations as binding on it. That the amount which the Bank has paid, and will be required to pay under the provisions of the act, is more than two thousand dollars. That the act is beyond the constitutional power of the legislature of the state because in violation of the provisions of the national Constitution as more particularly hereinafter stated. Wherefore, a decree is sought declaring the act unconstitutional and void, and enjoining the bank commissioner from issuing his certificate to the Bank that it is guaranteed in pursuance of the law, and the Bank from receiving and accepting the same, and the obligations imposed by the law; restraining defendant treasurer of the state from paying out said moneys deposited with him except by refunding the same to the Bank, and enjoining defendants from in any way carrying into force and effect the provisions of the law.

In Case No. 8816 in which the Assaria State Bank and forty six other state banks are complainants and the treasurer and bank commissioner of the state are defendants, it is averred at and before the passage of the act in question complainants were organized, qualified and doing a banking business under and in pursuance of the laws of the state, in the several different portions of the state where located. That in pursuance of the laws under which they were created and doing business prior to the passage and taking effect of the act in question, their shareholders were liable, in addition to the money represented by their shares, to an amount equal to the par value thereof to the creditors of the bank. That a part only of complainants are qualified to accept the terms of the act. That complainants are tax payers of the state, and a large amount of the funds so collected from complainants by taxation, forming a part of the general revenue fund of the state, is being employed by defendants in carrying into effect the act in question, but that no complainant has been required to, or will pay into such fund to
53 be so used the sum of two thousand dollars. That it is the object, purpose and intent of defendants, as officers of the state, to require all qualified banks to accept the provisions and obligations of the act. That many banks of the state are accepting its provisions. That more than seven hundred in number are qualified to accept under the provisions of the act. That those of complainants who are not qualified, and all complainants that are qualified but refuse to accept the provisions of the act, will be by the operation of the law, and the business advantages possessed by banks under the law, driven out of business and compelled to suspend operations. That as to each of the complainants the right to continue in business, which will be thus destroyed is of a value in excess of two thousand

dollars. That complainant banks are depositors in other banks of the state in large amounts, that have accepted the provisions of the act, or, being qualified, threaten to accept such provisions, and that the operation of the law discriminates against complainants. That the act in question is violative of the Constitution and laws of the United States, and the provisions of the Constitution of the State as well, in respects hereinafter stated. Wherefore, a decree is prayed declaring the act in question invalid and void and restraining defendants from enforcing its provisions.

In case No. 8817, wherein the Abilene National Bank of Abilene, Kansas, and one hundred and forty nine other national Banks are complainants, and the treasurer and bank commissioner of the state are defendants, it is averred at and before the passage and taking effect of the act in question, complainants, each and all, were organized under authority of national law and were engaged in doing business as national banks and as governmental agencies at different points within the state. While invited by section 13 of the act to accept its provisions, yet by the laws of their creation they are perpetually disqualified from so doing. That by their manner of doing business they are depositors in and creditors of many state banks which are qualified, and have or are threatening to accept the provisions of the act in question. That their shareholders are tax payers of the state, compelled by its laws to contribute to the general revenue fund of the state; That a portion of the funds
54 which the shareholders of complainants have been compelled by taxation to pay is being employed, and will be employed by defendants in carrying into effect the provisions of the act. But that no one of the complainants has or will be compelled by way of taxation to contribute the sum of two thousand dollars which will be employed in this manner by defendants. That complainants were organized by their shareholders and entered upon the conduct of the business and performing the functions of national banks within the state under the assurance from the national government such business would be protected against invasion by laws of the state. That there are more than seven hundred state banks organized and doing a banking business in the state which are qualified to accept the provisions of the act. That it is the object, intent and purpose of defendant officials of the state to require the qualified banks organized under the laws of the state to accept the provisions of the act in question. That many of them have, and others are threatening to so do. That by the natural and necessary operation of said act complainants will be compelled to either surrender their charters and organize as banking corporations under the laws of the state, and accept the provisions of the act, or be driven out of business. In this regard it is specially averred in paragraph IX of the bill, as follows:

"That the depositors in banks which have not accepted the provisions of said law are not guaranteed, while the depositors in banks which have accepted the provisions of said law suppose themselves to be guaranteed, and are led to believe by the State of Kansas and by the defendant J. H. Dolley as Bank Commissioner of the State

of Kansas, and by said guaranteed banks, that they are guaranteed, and the State of Kansas advertises that the depositors in banks which have accepted the provisions in said law are guaranteed; and that in case the law remains in force and effect, banks which may not accept the provisions of said law will be forced to cease doing business for the reason that all, or a large part of their deposits will be withdrawn, and will be forced to wind up their business or to reincorporate in such a way as to entitle them to the benefits of said law, if any such benefits there are. That the right of said complainant banks and the right of each of them to do business
55 and exercise the franchise of National banks is of the value of more than $2,000 exclusive of interest and costs, to each of said banks, and in case said law is enforced your orators and each of them will be compelled either to go out of the banking business or to surrender their charter as National banks and to reincorporate as State banks."

It is further averred in paragraph XIV of the bill, as follows:

"That said Bank Guaranty Law, in its force and effect and its practical application, is intended to be and is unjustly and unlawfully discriminatory in favor of and in behalf of the banks which shall accept of its provisions, and against all banks, State or National, which shall not accept of its provisions."

"That said law is in its very essence, fraudulent, and promotive of fraud and deception. In its practical workings it gives depositors a false assurance, and persuades and tends to persuade them that they are guaranteed and secured when they are in fact not guaranteed or secured. It requires of the Bank Commissioner a certificate which is false and misleading and which in its practical working, and especially because it emanates from the sovereign state, tends to mislead and deceive the public as to the degree of security offered. It encourages, makes easy and directly causes, false representation by so-called guaranteed banks, which banks are securing deposits by false signs and advertisements tending to persuade the public that their depositors are guaranteed by the State of Kansas and by an adequate special fund provided by the State of Kansas. Said act thus gives banks which accept its provisions, the right and power, under the guise and sanction of law, to obtain deposits by false and fraudulent representation; and by virtue of said law said banks are, as a matter of fact, so obtaining deposits to the great injury of banks honestly and fairly conducted.

"That said law in its practical operation and effect (Under and by virtue of the certificate which under the said act is to be issued by the Bank Commissioner to the banks which accept of the said guaranty provision) is intended to and will enable, authorize and empower the banks which accept the guaranty provisions to hold
56 out to depositors and to the public that the depositors therein are guaranteed, and that depositors in other banks are not so guaranteed, and all other banks are prohibited by the said law from giving out or advertising that their deposits are guaranteed, whereby and by reason whereof banks of small capitalization and otherwise insecure may induce and persuade citizens of

the State of Kansas, and others to deposit their money in said guaranteed banks in preference to making such deposits in banks not so guaranteed, and therein and thereby to wrongfully discriminate against and to deplete and diminish the deposits in banks not under the guaranteed system and to the advantage of the banks which are in the guaranteed system, and as against all banks which cannot, under the terms of the act, go into the said guaranty system, and including National Banks and as against trust companies which cannot go into the system."

It is further specially averred in paragraph XVII as follows:

"That each and all of the stockholders of complainant banks subscribed to such stock relying upon the guarantee of the Federal Constitution, and that the said banks in which they became stockholders would be permitted to carry on and prosecute their business in the state of Kansas without any interference by partial and discriminating legislation, or legislation which would give to state banks an unequal and undue advantage over National Banks. That said Chapter 61, Laws of 1909 in its effect and operation, gives to state banks an unequal and undue advantage over National Banks and impedes and frustrates them in the prosecution of their business, and impairs their efficiency, and deprives them of their trade, and induces a withdrawal of their deposits, and thereby destroys the value of the stock so held by their shareholders."

The act is further averred to be a violation of the provisions of the National Constitution as hereinafter more particularly stated. Wherefore, it is prayed a decree enter declaring the act unconstitutional and void and restraining defendants from enforcing its provisions as against the rights of complainants.

From this statement of the contents of the several bills of complaint, do complainants, or any of them, show themselves entitled to invoke the jurisdiction of this court for the purpose of
57 testing the validity of the act in question? That is, do they present a controversy under the Constitution or laws of the general government, the determination of which controversy may be decisive of the case, in which there is involved the amount required to give jurisdiction to this court?

In so far as complainant in Case No. 8810 is concerned, it is quite clear as he is a minority shareholder in a corporation, and brings the suit to prevent the company in which he is interested from the continued misapplication of its corporate funds, the amount involved in the controversy is the value of the right of the Bank sought to be protected by the suit, and not the burden which will be by the law laid on his shares.

In Davenport v. Dows, 18 Wall. 626, Mr. Justice Davis, delivering the opinion of the court, said:

"That a stockholder may bring a suit when a corporation refuses is settled in Dodge v. Woolsey (18 How. 340) but such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert

them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it."

In Hill v. Glasgow R. Co., 41 Fed. 610, which was an action by a minority stockholder to restrain a claimed misapplication of the funds of the company, it is said:

"The position assumed by the demurrants is that the complainant's interest in the litigation or controversy must amount to the value of $2,000 exclusive of costs and interest, in order to confer jurisdiction upon the court, and that, as it distinctly appears from the bill that such interest of the complainant does not exceed half that amount, the suit cannot be maintained.

58 "This position is not well taken. It overlooks and mistakes the true theory and principle of the bill, which is not the assertion of the complainant's private rights, but rather those of the company in which he had an interest. When suit is necessary to enforce corporate rights to avert wrongs threatening the corporate interests, the general rule is that the suit must be brought by the corporate management in the name of the corporation. Individual shareholders ordinarily are not the proper parties to sue or defend on behalf of corporate interests. It is, however, well settled that if the corporate management refuses or fails to enforce corporate rights, and an irreparable injury to the corporate interests is threatened, a shareholder in a case where the corporation itself would be entitled to an injunction, may bring suit, on behalf of himself and others interested who may join, to enjoin the threatened injury."

In Texas & P. Ry. Co. v. Kuteman, 54 Fed. 547, it is said:

"In a suit for an injunction the amount in dispute, is the value of the object to be gained by the bill. Fost. Fed. Pr. sec. 16. An injunction may be of much greater value to the complainant than the amount in controversy in cases of dispute which have already arisen. Symonds v. Greene, 28 Fed. Rep. 834; Whitman v. Hubbell, 30 Fed. Rep. 81. The maintenance of its rates is the real subject of dispute, and the object of the bill and the value of this object must be considered. Railroad Co. v. Ward 2 Black, 485. This value not being liquidated or fixed by law, the alleged value, especially on demurrer to the bill, must govern."

In the City of Hutchinson v. Beckham, 118 Fed. 399, Judge Thayer for the Circuit Court of Appeals for this Circuit said:

"From the complainants' Standpoint, therefore—and the case must be judged from their standpoint, and not exclusively from the standpoint of the city—the amount involved in the litigation was not merely the license tax of $500 which accrued on June 1, 1900, but it was the total amount of their loss incident to the causes aforesaid, if the bill was not entertained, and if the city was left free to pursue its own course in enforcing the ordinance. Our attention

has been invited to several cases which were brought to en-
59 join the collection of taxes that were alleged to be illegal, in which it was held that the amount in controversy for jurisdictional purposes was the amount of the tax (Transfer Co. v. Pendergrass, 16 C. C. A. 585, 70 Fed. 1; Walter v. Railroad Co. 147 U. S. 370, 13 Sup. C't 348, 37 L. Ed. 206; Railroad Co. v. Walker 148 U. S. 391, 13 Sup. C't 650, 37 L. Ed. 494) but an examination of these cases shows that they are not analogous to the case at bar, in that it did not appear that the complainants would sustain any other direct damage save the amount of the tax, which if paid under protest, they could recover in an action at law, if the tax was found to be illegal. The present case is distinguishable from the cases relied upon by the appellants, in that the tax involved is a license tax imposed by a municipality upon a business concern, the payment of which tax may be enforced by fining and imprisoning its employés and by daily arrests that will seriously interfere with the prosecution of complainant's business, and inflict a much greater direct loss than the amount of the tax."

In Board of Trade v. Cella Commission Co., 145 Fed. 28 Judge Hook delivering the opinion for the circuit court of Appeals for this circuit said:

"In a suit to enjoin a threatened or continued commission of certain acts the amount of value involved is the value of the right which the complainant seeks to protect from invasion, or of the object to be gained by the bill. It is not the sum he might recover in an action at law for the damage already sustained, nor is he required to wait until it reaches the jurisdictional amount."

In Humes v. City of Ft. Smith, 93 Fed. 857, it is said:

"The defendant insists that the court is without jurisdiction, because the amount in controversy does not exceed the sum of $2,000; that is to say, that the amount which the complainant would have to pay for license to conduct his business does not amount to that sum. Jurisdiction is not determined in that way. Jurisdiction is determined by the value of the right to be protected, or the extent of the injury to be prevented, by the injunction. Railway Co. v. McConnell, 82 Fed. 65."

In Scott v. Donald, 165 U. S. 107, Mr. Justice Shiras, delivering the opinion of the court, after referring to the averments of the bill, said:

60 "Such statements sufficiently concede that the pecuniary value of plaintiff's rights in controversy exceed the value of two thousand dollars. Nor can it be reasonably claimed that the plaintiff must postpone his application to the Circuit Court, as a court of equity, until his property to an amount exceeding in value two thousand dollars has been actually seized and confiscated, and when the preventive remedy by injunction would be no avail."

To like effect are the cases of Bitterman v. Louisville & Nashville R. R., 207 U. S. 205; Hunt v. N. Y. Cotton Exchange, 205 U. S. 322; Howe v. Howe & Owen Ball Bearing Co. 154 Fed. 820; Louisville & N. R. Co. v. Smith, 128 Fed. 1; Northern Pac. Ry. Co.

v. Pacific Coast Lumber Mfrs. Ass'n, 165 Fed. 1; City of Ottumwa v. *City of Ottumwa v.* City Water Supply Co., 119 Fed. 315.

In Barry v. Edmunds, 116 U. S. 550, Mr. Jusice Matthews in reviewing an order of the Circuit Court dismissing a bill on the ground here presented, said:

"The order of the Circuit Court dismissing the cause on this ground is reviewable by this court on writ of error by the express words of the act. In making such an order, therefore, the Circuit Court exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven and controlled by fixed rules of law. It might happen that the judge, on the trial or hearing of the cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however, strong, he would not be at liberty to act, unless the facts on which the persuasion is based when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction, on this account, "shall appear to the satisfaction of said Circuit Court." See, also, Henry & Sons, & Co. v. Colorado Farm & L. S. Co., 164 Fed. 986; North American Cold Storage Co. v. City of Chicago et al., 151 Fed. 120.

As the bill in this case specifically avers the amount the Bank will be compelled to deposit with the treasurer of the state,
61 if it is permitted to comply with the provisions of the act, is more than two thousand dollars, which may be employed by defendants in paying the obligations of other banks to their depositors, and hence not returned to the bank, and as the act contemplate- a continued course of business, I am not of the opinion the bill shows on its face a want of jurisdictional amount in controversy, but, on the contrary, the demurrer for want of jurisdiction as to that case must be overruled, if it be found a case arising under the Constitution and laws of the United States.

It is asserted by complainant in his bill the act in question is in violation of the national Constitution because it impairs the obligation of his contract as a shareholder in the Bank by taking its property, of which he in common with the other shareholders are owners subject only to the payment of the outstanding debts of the corporation, and applies it to the payment of private debts, which neither the Bank nor himself have contracted, and in so doing, without his consent and without an opportunity for him to be heard, is without due process of law. That this claim asserted by him, founded on the protection afforded by the National Constitution, is neither frivolous nor palpably unfounded is apparent.

In Walsh v. Columbus &c. Railroad Co., 176 U. S. 469, Mr. Justice Brown, delivering the opinion of the court, said:

"We have repeatedly held that, where the plaintiff relies for his recovery upon the impairment of a contract by subsequent legislation it is for the court to determine whether such contract existed, as well as the question whether the subsequent legislation has im-

paired it. State Bank of Ohio v. Knoop, 16 How. 369; Bridge Proprietors v. Hoboken Co., 1 Wall. 116. This rule also applies to a contract alleged to be raised by a state statute, although the general principle is undoubtedly that the construction put by state courts upon their own statutes will be followed here. Jefferson Branch Bank v. Skelly, 1 Black 436; McGahey v. Virginia, 135 U. S. 662; Douglas v. Kentucky, 168 U. S. 488; McCullough v. Virginia, 172 U. S. 102.

"We cannot say that it is so clear that the statute in question is not open to the construction claimed that we ought to dismiss
62 the writ as frivolous, within the meaning of the cases which hold that, where the question is not of the validity but of the existence of an authority, and we are satisfied that there was and could have been no decision by the state court against any authority of the United States, the writ of error will be dismissed."

In Illinois Central Railroad v. Chicago, 176 U. S. 646, same Justice, delivering the opinion, said:

"Without determining the effect of such ordinance, the question whether it impairs the charter of the company, giving to that charter, a broad construction, is fairly open to contention. Bacon v. Texas, 163 U. S. 207, 216; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 5, 10. The claim is certainly not a frivolous one. In determining the existence of a Federal question it is only necessary to show that it is set up in good faith and is not wholly destitute of merit."

From a consideration of the averments of the bill of complaint in Case No. 8810 I am of the opinion the suit of complainant is one which involves a controversy arising under the provisions of the Federal Constitution, and that the amount in controversy is sufficient to confer jurisdiction on this court.

Therefore, the demurrer, in so far as based on want of jurisdiction, must be overruled.

In regard to the averments of the bill of complaint in Case No. 8816, considered for the purpose of determining its sufficiency to confer jurisdiction on this court, to inquire as to the validity of the act in question, it may be observed, in the first instance, it is wholly immaterial to complainants whether the act be constitutional and valid or unconstitutional and invalid in its scope, operation or effect in its relation to others. Before complainants may be heard to complain they must show by the averments of their bill such a state of facts existing or threatened as will work a justiceable injury to themselves. Supervisors v. Stanley, 105 U. S. 305; Clark v. Kansas City, 176 U. S. 114; Smiley v. Kansas, 196 U. S. 447. As in the present case the parties are each and all citizens of this state, it matters not how much injury may come to complainants by the enforce-
63 ment of the act, even if it be unconstitutional in matters averred in violation of the provisions of the Constitution of the state, for such matters are exclusively for the consideration and determination of the courts of the state, unless, in addition thereto, the bill presents a state of facts, which in good faith raises a controversy as to the validity of the act arising under the Constitution and laws of the United States, the decision of which controversy may be

determinative of the case. Metcalf v. Watertown, 128 U. S. 586; Tennessee v. Union and Planters' Bank, 152 U. S. 454; Blackburn v. Portland Gold Mining Co., 175 U. S. 571.

Examined in the light of these principles, do the averments of the bill of complaint in Case No. 8816 present a controversy arising under the Constitution and laws of the United States, in which controversy there is involved an amount sufficient to confer jurisdiction on this court?

As seen from the statement made, complainants were corporations of the state, duly organized and doing a banking business within the state at and prior to the date of the passage and taking effect of the act in question. That a part only of complainants are qualified to accept the conditions imposed and receive the benefits of the act in question. That prior to the passage of this act their shareholders were liable only to creditors of the bank to the amount paid for the shares, and in addition, the face value of the shares. That if complainants shall accept the provisions of the act they will impose an additional burden on their shareholders to contribute for losses sustained by depositors in other institutions. That as to those of complainants qualified to accept the provisions of the act, which do not accept, and those disqualified, the advantage obtained by those institutions which do accept the provisions of the act will destroy the business of complainants, the value of the right to continue which exceeds in amount that necessary to confer jurisdiction on this court. That complainants in common with other citizens, tax payers of the state, have been compelled by taxation to contribute to the general revenue fund of the state, which is being employed by defendants to carry the act into operation. That complainants are depositors in and creditors of other state banks which have
64 accepted the conditions and obligations imposed by the act, and that the operation of the act in settling the affairs of such other banks will unjustly discriminate against complainants as creditors of such other banks, and will impair the obligation of complainants' contracts with such banks.

In so far as complainants qualified to accept the provisions of the act, but decline to do so, I see no just cause on their part to complain of discrimination against them. If any are discriminated against by the terms of the act, the privileges of which they may accept, and they decline to do so, it is their failure to accept, and not the law, which causes the injury, and they will not be heard to complain. As to those complainants disqualified from participating in the benefits of the act, it is not shown the condition which produces this disqualification may not be changed by such banks and the provisions of the act then accepted. If so, such of complainants may not be heard to contend of the law's discrimination against them, for, in such case, it is not the law, but the facts constituting the disqualifying conditions which produces the discrimination. This clearly appears from a consideration of the case of Merchants' Bank v. Pennsylvania, 167 U. S. 461, wherein Mr. Justice Brewer, delivering the opinion said:

"If it be said that a lack of uniformity renders the statute obnox-

ions to that part of the Fourteenth Amendment to the Federal Constitution which forbids a State to "deny to any person within its jurisdiction the equal protection of the laws" it becomes important to see in what consists the lack of uniformity. It is not in the terms or conditions expressed in the statute, but only in the possible results of its operation. Upon all banks shares, whether state or national, rests the ordinary state tax of four mills. To every bank, state and national and all alike, is given the privilege of discharging all tax obligations by collecting from its stockholders and paying eight mills on the dollar upon the par value of the stock If a bank has a large surplus, and its stock is in consequence worth five or six times its par value, naturally it elects to collect and pay the eight mills, and thus in fact it pays at a less rate on the actual value of its property than the bank without a surplus, and whose stock is only worth par. So it is possible, under the operation of
65 this law, that one bank may pay at a less rate upon the actual value of its banking property than another; but the banks which do not make this election, whether state or national pay no more than the regulation tax. The result of the election under the circumstances is simply that those electing pay less. But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution. * * *

"Again, it will be perceived that this inequality in the burden results from a privilege offered to all, and in order to induce prompt payment of taxes, and payment without litigation. To justify the propriety of such inducement, we need look no further than the present litigation."

In so far as the bill avers the misapplication of the revenues of the state raised from complainants and others by taxation, while it is true by reason of the prov-sions of Chapter 334, Laws of 1905, an injunction may be granted to restrain the illegal levy of any tax, charge, or assessment, or any proceeding to enforce the same, and that an injunction may be granted to restrain any public officer, board or body from entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge or assessment, and that any number of persons whose property may be affected by any tax or assessment so levied, or whose burden as tax payers may be increased by the threatened, unauthorized contract or act, may unite in a suit to obtain such relief; and while in a proper case the statutory right of suit here granted might be asserted in this court, yet, it is clear, as between citizens of this state such right cannot be enforced here even if the value of the rights sought to be protected were sufficient to confer jurisdiction on this court, for such controversy does not arise under the Constitution and laws of the United States.

In so far as it is averred in the bill, by the operation of the act in question, the rights of complainants, as depositors and creditors of other state banks which have accepted or threaten to accept the provisions of the act, are discriminated against and their contract rights impaired, it will be noticed it is not averred any such guar-

anteed bank in which any complainant has a deposit or credit, has failed, or its affairs are about to be settled under the provisions
66 of the act, hence, of necessity, the prosecution sought against that feature of the act, under the averments of the bill at this time, rests in mere speculation and is based on no tangible right of complainants. If such event shall transpire in future, and this feature of the act of which complaint is made shall be attempted to be enforced, to the impairment of the contract rights of any complainant, a controversy of merit may then arise, but such controversy is not presented by the bill in question.

It follows, the demurrer based on want of jurisdiction in Case No. 8816 must be sustained. And unless complainants, being so advised by their solicitors, shall amend their bill of complaint by the January 1910 rules of this court the bill will stand dismissed for want of jurisdiction.

In so far as the averment of facts contained in the bill of the national Banks is concerned, considered now only for the purpose of determining whether a controversy is thereby presented within the jurisdiction of this court, it may be observed, such corporations are created under, are regulated by and derive their authority solely from national laws, therefore were it not for the act of Congress of July 12, 1882, (amended August 13, 1888) which provides for the purpose of jurisdiction national banks shall be deemed citizens of the state in which they are located, as they are created by virtue of national laws, this court would have jurisdiction over any controversy touching their rights under the law of their creation. Osborn v. United States Bank, 9 Wheat. 817; Pacific Railroad Removal Cases, 115 U. S. 1; County of Wilson v. National Bank, 103 U. S. 770; Cummings v. National Bank, 101 U. S. 153; Butler v. National Home for Soldiers, 144 U. S. 64; Wash. & Idaho Rd. v. Cœur D'Alene Ry. 160 U. S. 77; Texas & Pacific Railway Co. v. Cox, 145 U. S. 593.

While by force of the statute, for the purpose of jurisdiction of this court, complainants in case No. 8817 must be deemed citizens of this state, and no jurisdiction of this court may attach by reason of complainants being created by national laws, yet, when a right is asserted by a national bank under authority of the law of its creation, the determination of such right involves a federal question, of which this court has jurisdiction, if the amount involved be sufficient to confer jurisdiction on this court, and jurisdiction once having attached, the court may proceed to a complete determination of the rights of the parties as to all matters in issue.

67 While by section 13 of the act in question the benefits and privileges of the act are tendered national banks doing business in the state, on condition of their submitting to the visitorial control of state officials, and on condition that such acceptance be authorized by their shareholders and board of directors, in the manner provided in section 1 of the act, and on compliance with the other conditions of the act, yet, that complainants by the very law of their creation are precluded from accepting the terms, conditions and obligations of the act, does not admit of doubt or argu-

ment, but is conceded. Therefore, as the disqualification of complainant national banks to accept the provisions of the act arises not from the consideration of any question of fact but solely and alone from the provisions of the law of their creation, enacted in pursuance of authority conferred on Congress by the national Constitution, which is the supreme law of the land, it must be conclusively presumed the legislature of the state in enacting the act in question, notwithstanding the provisions of section 13, knew complainants could not accept the conditions and obligations of the act, receive the benefits thereof, or be found thereby.

Bearing in mind these general observations the jurisdiction of this court over the controversy presented by the facts charged in the bill will be considered.

As has been seen by the statement made, the facts relied upon to confer such jurisdiction are: (1) That complainants are by the act unjustly discriminated against: (*a*) because not entitled to share its benefits and protection in common with others; (*b*) as depositors and creditors of state banks which have accepted the provisions of the act in the liquidation of their affairs. (2) That it was the object, intent and purpose of the act to destroy the business of complainants as national banks, and that in its actual operation such is its effect, and that the value of the right of each complainant to continue in the business transacted by it is in excess of the amount necessary to confer jurisdiction on this court. (3) That complainants are, in common with others, being assessed under the revenue laws of the state and have paid into the treasury of the state large sums of money raised by taxation, which is being by defendant officials unlawfully expended in putting the act
68 in operation the benefits of which complainants may not enjoy.

In so far as complaint is made of the act in question, that its operation will discriminate against complainants as depositors in or creditors of those banks of the state which are qualified to and do accept the provisions of the act in the liquidation of the affairs of such banks after insolvency has intervened, as has been said, in case No. 8816 of the state banks, the bill in this case does not charge any such imminent injury as stands in need of protection at this time. Any such injury to complainant must depend: (1) on the failure of such guaranteed state bank; (2) that complainants, or some one of them, shall, at the date of such failure, be a depositor in or creditor of such a bank. Therefore, it will be sufficient if the rights of complainants in this respect shall be considered when a case arises in which relief against a threatened injury is actually existent and apparent.

In so far as the bill charges defendants with the misapplication of funds raised by taxation from complainants and others, in carrying the act in question into operation and effect and seeks to restrain such unauthorized act of expenditure by defendant officials, I am persuaded: (1) Chapter 334, Laws of 1905, the provisions of which have been heretofore stated, confers a right of suit which may be enforced by complainants in protecting the interests of their

shareholders. Pelton v. National Bank, 101 U. S. 143; Cummings v. National Bank, 101 U. S. 153; Hills v. Exchange Bank, 105 U. S. 319; (2) That in a proper case, and by the word "proper" I mean a case over which this court has jurisdiction, such statutory right of suit as is therein granted may be enforced by a Circuit Court of the United States sitting in equity. Van Norden v. Morton, 99 U. S. 378; Norwood v. Baker, 172 U. S. 269; Cummings v. National Bank, *supra;* San Francisco National Bank v. Dodge, 197 U. S. 70; Williams v. Crabb, 117 Fed. 193; Platt v. Lecocq, 168 Fed. 723. (3) As the statute permits any number of persons, whose burdens as tax payers may be increased by the doing of the threatened, unauthorized act of an official, to join in the complaint brought to obtain the injunctive relief, it is the value of the right sought to be protected from invasion by the doing of the unlawful act
69 threatened and not the interest of each separate complainant as measured by the amount its burden of taxation will be increased, that determines the amount in controversy, considered for the purpose of establishing the jurisdiction of the court, in which suit is brought. Gibson v. Corbin, 112 U. S. 36; Brown v. Trousdale, 138 U. S. 389; Ogden City v. Armstrong, 168 U. S. 224; City of Ottumwa v. Water Supply Co. 119 Fed. 315; Johnston v. City of Pittsburg, 107 Fed. 763; Board of Trustees v. Berryman, 156 Fed. 112.

However, if the right of complainants to bring and maintain such suit be based either on the authority of the statute of the state to which reference has been made, or if it be traced to the general principles of right and justice, to which reference is made by the court in Crampton v. Zabriskie, 101 U. S. 601, it is equally clear, since the passage of the act of June 12, 1882, fixing the citizenship of national banks for the purpose of jurisdiction in the state in which they are chartered to engage in business, such suit may not be instituted by complainants in this court no matter what may be the amount in controversy, for the determination of the right asserted does not involve the construction of the Constitution or laws of the United States, hence, does not raise a Federal question. However as has been seen, since in a suit involving such controversy over which a Federal court has jurisdiction on other grounds, such as the diverse citizenship of the parties, or when the controversy arises between citizens of the same state, and by reason of the state of facts charged in the bill the relief is not demanded alone by virtue of such state statutory right, but facts sufficient in addition thereto are averred to entitle complainants to the relief prayed, based on the construction of the Constitution or laws of the United States so as to clearly raise a Federal question, a Circuit Court of the United States may take jurisdiction, and having so done, may proceed to a determination of the entire controversy.

There remains for consideration in determining the jurisdiction of this court over the controversy presented by the bill only the charge that the act denies to complainants the equal protection of the law, in violation of the Fourteenth Amendment.

It is true, as contended by demur-ant, in so far as the intent
70 of the legislature in the passage of the act, and its natural and necessary operation and effect is concerned, such matters must be gathered by the court from a consideration of the terms of the act itself, and are not controlled by the averments of the pleader drafting the bill. Dillon v. Barnard, 21 Wall. 430; Equitable Life Assurance Soc. v. Brown, 213 U. S. 25. However, as the bill in accepted the provisions of the act, and that the act in its actual operation and effect, induces depositors of complainants to withdraw their deposits from complainants and deposit in banks which have accepted the provisions of the act, and that the act in its actual operation is destructive of the business of complainants, such statements must be treated as averments of actual existing facts susceptible of proof. Therefore, in the light of the facts averred in the bill of complaint in this case, I am of the opinion sufficient is averred to require a consideration of the validity of the act under the provisions of the Fourteenth Amendment to the Constitution, and to require the taking of proofs if denied. Therefore, the demurrer to the complaint in this case, based on lack of jurisdiction in the court, must be overruled.

Coming now to a consideration of the act itself for the purpose of determining its validity in respect to those matters charged against it in the bills in cases numbered 8810 and 8817 it should be observed, if the act be not found clearly in violation of the provisions of the national Constitution and laws in respect to the matters charged its validity must be maintained. With the policy of the act, if valid, whether it shall prove in operation beneficial or detrimental, courts have no concern. That is a question to be considered alone by the law making power of the state, and for which the courts assume no responsibility. If, however, from a consideration of the provisions of the act itself, and the charges made in the complaints in connection with the rights of the parties litigant, as prescribed in and guaranteed by the provisions of the *natural* Constitution, as construed by the highest judicial tribunal in this land, it be found the law making power of the state has clearly exceeded its constitutional powers, to the damage of complainants, in matters charged in
71 the bills, then no alternative is left but to so declare. For this purpose courts were established, to which litigants having a justiciable controversy therein have an absolute right to resort, which right may not be denied them, and from which resort they may not be turned away, their cause unheard.

Chief Justice Marshall in the great case of Cohens v. Virginia 6 Wheat. 264, said:

"It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should The judiciary cannot as the legislature may, avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is

not given The one or theother would be treason to the Constitution. Questions may occur, which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."

The charges made by complainant in Case No. 8810 against the act, are: (1) That it impairs the obligation of his contract and the contracts of these similarly situated with him, as shareholders, in violation of Article 1 of Section 10 of the national Constitution; (2) that the act and its acceptance by the Bank, and the deposit of the funds of the bank, under the requirements of the act, with the treasurer of the state, to be distributed in accordance with its provisions, deprives complainant, and those similarly situated with him, of their property without due process of law.

In case No. 8817, the sole question presented is, that the act in question discriminates against complainants to their injury and denies them the equal protection of the law, in violation of the provisions of the Fifth and Fourteenth Amendments to the national Constitution.

Article 11, Section 1, of the Constitution of this state, provides:

"The legislative power of this state shall be vested in a house of representatives and senate."

72 By this provision of our State Constitution all legislative power possessed by the people of the state in their collective capacity except that which has been in express terms, or by necessary implication, by the Constitution of the United States conferred on the national Congress, resides in the legislature of this state, except in so far as by the terms of the state Constitution the people have reserved such power to themselves or restrained that body from its exercise.

It will be observed by section 1 of the act in question, the legislature has not attempted the direct exercise of its power on any person, natural or corporate, within its jurisdiction. It has not by the exercise of its legislative power declared a necessity that any depositor in any bank shall be secured from loss, nor that any banking institution shall provide a guarantee fund for its depositors, or any class of such depositors. In other words, the act in question, of its own weight, touches no subject in either person or property. Before it becomes of any force or effect as a rule of action or conduct for the government of banking associations, the existence of three contingencies, depending on facts, must be established. (1) The institution must be an incorporated banking association doing business in the state, possessing the qualifications required by the act; (2) Such banking association must through its board of directors, authorized by its shareholders, pass a resolution accepting the provisions of the act; (3) on the filing of such resolution with the bank commissioner of the state, he is required to make an examination of the affairs of the institution, and if found by him from such examination to be properly managed in accordance with the banking laws of the state, and it shall deposit with the treasurer bonds or money in accordance with the provisions of the act, the bank commissioner shall issue his certificate of authorization.

What the legal effect of this act may be after its passage and approval before any banking association had accepted its provisions, or as to any banking association before such acceptance, raises a question of some doubt. For, it is clear, as the form of government of the States of this nation, and the nation itself, is not purely republican but is a representative republican form of government; and as by the terms of our state Constitution all legislative power
73 possessed by the state has been conferred on a house of representatives and senate in legislative session assembled, that all the electors of the state at an election called for that purpose voting in favor of the adoption of the provisions of the act in question, could not have constituted it a law of the state. Hence, as it is beyond the power to all of the electors of the state by their expressed consent to constitute the provisions of the act in question a law of the state, does it not follow, of necessity, that which is ineffectual to bind any citizen of the state as law, without the consent of the citizen, cannot become binding in any other than a contractual sense from its acceptance by the person to be bound thereby.

However, this may be, one thing is clear, the act being permissive only, and not compulsory, and depending on its acceptance by the person to be bound thereby, and not alone on the law making will, the source of its authority may not be traced to the exercise of the police power of the state. For, the police power of the state is a power resorted to of necessity in the protection and promotion of the health, comfort, safety and welfare of society. Being a law of force and necessity, of restraints and prohibitions, it may not be by the state committed to the judgment of the citizen to determine whether he will or will not be bound by its exercise. Tiedman's Limitations of Police Powers, Section 1; Freund on Police Power, sec. 3, 8, and 22; Locner v. New York, 198 U. S. 45; C. B. & Q. Railway v. Drainage Comm's. 200 U. S. 561; Lawton v. Steele, 152 U. S. 133; Reduction Company v. Sanitary Works, 199 U. S. 306; Gardner v. Michigan, 199 U. S. 325; Ritchie v. People, 155 Ill. 98; People v. Stede, 231 Ill. 340.

Counsel for the defense in their brief assert the effect of the act in question to be only *"a permit by the state for banking corporations to amend the charters under which they are doing business."* If this statement of the extent and effect of the law be accepted, the question presented is, can the state lawfully authorize a majority of the shareholders of the Bank to so amend its charter as to pledge a portion of its assets to secure the obligations of third persons as against the protest of a dissenting shareholder, and does not such authorization by the state operate to deprive a dissenting
74 shareholder of his property without due process of law? And does not the act of the Bank in making a pledge of its property under such authorization impair the binding force of the contract of the dissenting shareholder with the Bank and the state?

Section 1, Article 12, of the Constitution of the state provides:

"The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed."

The Bank in this case was created under the general incorporation act of the state. The manner in which its funds might be invested was prescribed by section 417, General Statutes 1901, as follows:

"No bank shall employ its moneys, directly or indirectly in trade or commerce, by buying and selling goods, chattels, wares and merchandise, and shall not invest any of its funds in the stock of any other bank or corporation, nor make any loans or discounts on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith."

That the charter of a private corporation having a capital stock, such as the Bank in question, constitutes a contract between the state and the corporation, between the state and the shareholder in the corporation, and between the corporation and its shareholders, must be conceded to be settled by the authorities. State Bank of Ohio v. Knoop, 16 How. 369; Cooley on Const. Limitations, 5th ed. sec. 337; Livingston v. Lynch, 4 Johns Ch. 573; Haturch v. Irving, 2 Coppers, Ch. 358. That under the power of amendment and repeal reserved in the Constitution of this state, the legislature may take away and destroy all charter, rights and privileges granted for governmental purposes, and not creating a private contract, must be conceded. But, if this is done, the contract rights of the shareholders to the property after the payment of the obligations of the corporation, still remain. Mr. Justice Miller, delivering the opinion of the court in Greenwood v. Freight Co., 105 U. S. 13 said:

"Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such repeal;
75 and the courts may, if the legislature does not provide some special remedy, enforce such rights by the same means within their power. The rights of the shareholders of such a corporation, to their interest in its property, are not annihilated by such a repeal, and their must remain in the courts the power to protect those rights."

In Wilmington Railroad v. Reid, 15 Wall. Mr. Justice Davis, delivering the opinion, said:

"It has been so often decided by this court that a charter of incorporation granted by a state creates a contract between the state and the corporators, which the state cannot violate, that it would be a work of supererogation to repeat the reasons on which the argument is founded."

Again, that under the power reserved in the Constitution the legislature may lawfully amend the provisions of the general incorporation law under which the Bank was incorporated, must be and is conceded. But to this power of amendment there is a limitation set beyond which the state may not go.

In Shields v. Ohio, 95 U. S. 319, Mr. Justice Swayne, delivering the opinion of the court said:

"The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserve powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as invio-able as in other cases."

The property of a shareholder may be used by the corporation in any legitimate manner to further the business for which the corporation was created, and the state may, under its reserve power of amendment from time to time change the manner of such use and the means employed to further the purpose for which the corporation was created, but "a material and fundamental change in the charter by an amendment to that charter is an unconstitutional violation of the contract rights of any shareholder who does not consent to such an amendment." Cook on Stock and Stockholders, 3d ed. sec.
76 500; Marietta, etc. R. R. Co. v. Elliott 100 St. 57; Fry's Executor v. Lexington etc. R. R. Co. 2 Metc. (Ky.) 314; Hill v. Glasgow R. Co. et al. 41 Fed. 610; Stephens v. Rutland R. R. Co. 29 Vt. 545; Middlesex Turnpike Corporation v. Locke, 8 Mass. 268; Cherokee Iron Co. v. Jones, 52 Ga. 276.

That the act of the bank in pledging its property, as has been done in this case, to be applied to the discharge of the obligations of third parties, in the absence of the authorization of the act in question, would be an act beyond its authority, *ultra vires* and void, must be conceded. That the contract of the depositor with a bank is a private contract, and that money taken for the purpose of reimbursing such depositor for loss sustained, or which may be sustained on such contract, is a taking of property for a private and not a public or governmental purpose is conclusively settled. State v. Township of Osawkee, 14 Kan. 418; Lowell v. Boston, 111 Mass. 454. That the state may not through the exercise of the power of taxation, or by the exercise of any other governmental power, take private property for a purely private purpose is also conclusively established. Loan Ass'n v. Topeka, 20 Wall. 655; Parkersburg v. Brown, 106 U. S. 487; Cole v. La Grange, 113 U. S. 1; Dobbins v. Los Angeles, 195 U. S. 223; Mo. Pac. Ry. v. Nebraska, 164 U. S. 403; Dodge v. Mission Township, 107 Fed. 827; Crescent Liquor Co. v. Platt, 148 Fed. 894; Alma Coal Co. v. Cozad, 79 O. St. 344; Baltimore & Eastern Ry. Co. v. Spring, 89 Md. 510; Lucas v. State 75 O. St. 114; State vs. Froehlich 118 Wis. 129; William Deering & Co. v. Peterson, 75 Minn. 118; State v. Switizler, 143 Mo. 287.

As, therefore, an attempt on the part of the Bank to employ its property for the purpose of securing the contract of deposit made by an individual with another bank, or in reimbursing such depositor for loss sustained on his contract, is clearly beyond its power and void as against complainant, a shareholder in the Bank; and as the use of money for such purpose is a purely private use, for which the state may not take it, it follows, of necessity, that which is beyond the power of the state to take directly is beyond its power to

authorize a corporation of its creation to take for such purpose, against the protest of complainant, a minority shareho-der dissenting therefrom, and it must be held the act of the state in attempting to confer such power on the Bank impairs the obligations of the contract of complainant who dissents therefrom, with the Bank, and with the state, in violation of section 10 of the national con-
77 stitution. Such a taking is also without due process of law and in violation of the Fourteenth Amendment to the Federal Constitution.

As to what constitutes due process of law, Mr. Justice Brown, in Holden v. Hardy, 169 U. S. 366, said:

"Recognizing the difficulty in defining with exactness, the phrase "due process of law" it is certain that these words imply conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation."

It follows, the demurrer, for want of equity, in case No. 8810 must be overruled.

Is there want of equity in the averments of the bill in case No. 8817 of the national banks? It is true, as asserted by complainants in this case, national banks are created by authority of Congress for a public purpose, and are necessary instrumentalities and agencies of the general government. In Osborn v. United States Bank, 9 Wheat. 738, Chief Justice Marshall, delivering the opinion of the court, said:

"Let this distinction be considered.

"Why is it, that Congress can incorporate or create a bank? This question was answered in the case of McCulloch v. State of Maryland. It is an instrument which is "Necessary and proper" for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter? If it can, if it be as competent to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of its charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of subject, the vital part of the corporation; it is its soul; and the right to preserve it originates in the same principle, with the right to preserve the skeleton or body which it animates. The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained, as a dis-
tinction between the right to sentence a human being to
78 death, and the right to sentence him to total deprivation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute."

In Farmers' etc. Nat. Bank v. Dearing, 91 U. S. 29, Mr. Justice Swayne, delivering the opinion of the court, said:

"The national banks organized under the act are instruments de-

signed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is "an abuse, because it is usurpation of power which a single state cannot give." Against the national will "the States have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control, the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. Bank of the United States v. McCulloch, supra; Weston and Others v. Charleston, 2 Pet. 466; Brown v. Maryland, 12 Wheat. 419; Dobbins v. Erie County id. 419. The power to create carries with it the power to preserve. The latter is a corollary from the former.

"The principle announced in the authorities cited is indispensable to the efficiency, the independence and indeed, to the beneficial existence, of the General Government; otherwise it would be liable, in the discharge of its most important trusts, to be annoyed and thwarted by the will or caprice of every state in the Union. Infinite confusion would follow. The government would be reduced to a pitiable condition of weakness. The form might remain, but the vital essence would have departed."

In Davis v. Elmira Savings Bank, 161 U. S. 275, Mr. Justice White, delivering the opinion of the court, said:

"National Banks are instrumentalities of the federal government created for a public purpose, and as such necessarily subject
79 to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

In Easton v. Iowa, 188 U. S. 220, Mr. Justice Shiras delivering the opinion of the court said:

"That legislation has in view the erection of a system extending throughout the country, and independent, so far as power is conferred or concerned, of state legislation which, if permitted to be applicable might, impose limitations and restrictions as various and numerous as the states. Having due regard to the national character and purposes of that system, we cannot concur in the suggestions that national banks, in respect to the powers conferred upon them, are to be viewed as solely organized and operated for private gain."

In McClellan v. Chipman, 164 U. S. 347, Mr. Justice White, delivering an opinion of the court, said:

"National banks "are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when state law, incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." National bank vs. Commonwealth, 9 Wall. 362.

In the light of this relation of complainants, as national banks to the general government and the state, taking into consideration the fact that national banks by the very law of their creation, which all are conclusively presumed to know, are disqualified and prohibited from accepting the provisions of the act in question, and that the legislature of the state, notwithstanding the provisions of section 13 of the act knew at the time of its passage complain-
80 ants were so prohibited; and further, considering the averments of the bill, not only that the act in its actual operation was intended to deprive complainants of their customers and business, thus injuring the rights of their shareholders and impairing their efficiency to discharge the public duties for which they were created, to such an extent as to destroy their business and compel them to surrender their charters, but that in actual operation by the employment of such means, instrumentalities and devices as are authorized by the act to be employed by those state incorporated banks which have accepted the provisions of the act, such is its actual effect in operation, can there be a doubt of the right of complainants to relief from such unhappy situation, or that an act of the state authorizing corporate citizens of its creation to so embarrass and destroy other citizens created by national authority, which cannot escape by accepting its terms is such an unjust and unreasonable discrimination as amounts to a denial to complainants of the equal protection of the laws? If it were within the power of complainants, as it is of incorporated state banks, to accept the provisions of the act, and thus escape the embarrassment of their situation, they would not, perhaps, be heard to complain on this ground. Or, if their disqualification arose from a state of facts admitting of reasonable adjustment, they might not, perhaps, be heard to complain of the discrimination of the law against them, for by the terms of the act, all are invited, under certain conditions, to assume its burdens and accept its benefits. But, as to complainants, disqualified by the law of their very existence, the benefits and obligations of which they must surrender before they may accept the invitation extended, the very invitation itself becomes a mere *brutum fulmen* and is in legal effect as though complainants, by name, had been expressly forbidden and prohibited from accepting and enjoying the privileges extended by the act to those institutions of state origin qualified, or which may become qualified, under its terms.

From a consideration of the provisions of the act in question for the purpose of discovering its true intent, object and purpose, in view of the fact that national banks are prohibited from accepting its

provisions and participating therein, and as such prohibition arises from the law of their creation, which is conclusively pre-
81 sumed to be known of all men, it must be found the true intent, object and purpose of the act in question was to enable certain banks incorporated under the laws of the state, by accepting its provisions, to create and maintain a fund in possession of the treasurer of the state, to be employed for the purpose of securing the payment of certain favored contracts of deposit made with any bank contributing to such fund in case of the insolvency of any contributing bank, to the exclusion of all other contract creditors with such insolvent bank, and for the purpose of making public display of the fact that the deposits with any contributing bank are guaranteed under the terms of the act for the purpose of attracting depositors to such bank. If this be its true intent and purpose must not the natural and inevitable effect of such an act be to attract deposits, and especially those of the guaranteed class, from all other banks not participating, and draw them into the banks co-operating with the state in the enterprise, to the disadvantage and loss of those prohibited from participating. This is the actual effect of the arrangement in operation as averred by complainants in their bill.

The question of grave and controlling importance is, does such legislation by, and co-operation of the sovereign state with banks of its creation, violate rights guaranteed to complainants by the national Constitution and laws enacted in pursuance thereof, which are alike the supreme law of the land, and the law of complainants' existence.

It is true, as contended by defendants, this law does not operate directly in any manner on complainants. It in no way controls or regulates the conduct of their business affairs. It prescribe no rules for complainants' guidance and prefixes no penalties for their violation. It directly creates no burden which they must assume and carry, therefore it is confidently asserted by demurrants, whatever disadvantage in business affairs, inconvenience or loss may befall complainants from the actual operation of the act is merely incidental to the lawful exercise of legislative power by the state, therefore they will not be heard to complain.

The government through the lawful exercise of its constitutional power has deemed it wise to create its instrumentalities and agents in all parts of this commonwealth, in the necessary and con-
82 venient transaction of its public governmental affairs, the continued existence of which, with functions unimpaired, are as essential to the objects of government as was their creation in the first instance; therefore, wherever the power of the government was exerted for the establishment of such necessary instrumentalities, does not the power of the government extend for their protection against destruction or impairment of their ability to discharge the public functions which were the object of their creation, and this regardless of the fact as to whether the force destructive of their continued existence or vitality arises from a direct exercise of the power of the state against them, or such destructive force be created against

them on the part of the state by indirection? Must not the power to create a life, the continued existence of which is necessary for the purpose of the creator, of necessity include the power to preserve that life, with vigor unimpaired, against a destructive force arising from one source as well as another? I think this must be true. In the great case of Marbury v. Madison, 5 U. S. (*i* Cranch) 137, Chief Justice Marshall, delivering the opinion of the court, said:

"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government within limited and unlimited powers is abolished, if those limits do not confine the persons on which they are imposed, and if acts prohibited and acts allowed, are of equal obligation."

In Hugler v. Kansas, 123 U. S. 623, Mr. Justice Harlan, delivering the opinion of the court, said:

"The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature, had transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has not real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In reason, therefore, may not complainants, as national
83 banks, challenge, the constitutional validity of the act which confers privileges on incorporated banks of the state which are denied to them, not from choice but by the law of their existence, with like propriety and effect as though the act cast on complainants burdens from which such state banks are by the terms of the act exempt? And do not the authorities controlling here so declare?

The language of the Fourteenth Amendment is:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, *nor deny to any person within its jurisdiction the equal protection of the laws.*"

Mr. Justice Field, in Hayes v. Missouri, 120 U. S. 68, said:

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in Barbier v. Connolly, speaking of the Fourteenth Amendment: "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the

sphere of its operation it affects alike all persons similarly situated, is not within the amendment." 113 U. S. 27, 32.

In Yick Wo v. Hopkins, 118 U. S. 356 Mr. Justice Matthews, delivering the opinion of the court, said:

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, or color or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

84 In Connolly v. Union Sewer Pipe Co., 184 U. S. 540, Mr. Justice Harlan, delivering the opinion of the court, said:

"We have also said: "The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; undoubtedly intended not only that there should be no arbitrary deprivation of life, or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."

In Regan v. Farmers Loan & Trust Co. 154 U. S. 362 Mr. Justice Brewer, delivering the opinion of the court said:

"The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

In Cotting v. Kansas City Stock Yards Co. &c. 183 U. S.,

85 79, Mr. Justice Brewer, delivering the opinion of the court, and quoting with approval from the opinion of Judge Catron in Vanzant v. Waddel, 2 Yerger 260 said:

"Every partial or private law, which directly proposes to destroy

or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law by another."

In State v. Goodwill, 33 W. Va. 179, it is said:

"The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances, and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void."

"The inhibition of the Fourteenth Amendment, that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons being singled out as a special subject for discrimination and favoring legislation." State v. Mitchell, 97 Me. 66.

In McKinster v. Sager, 163 Ind. 671, that court said:

"But it is not the business of the state to make discriminations in favor of one class against another, or in favor of one employment against another. The state can have no favorites. Its business is to protect the industry of all, and to give all the benefit of equal laws."

In the light of the foregoing authorities, it must be held, a legislative enactment that confers special privileges and benefits on a class which, by the law, and not by conditions are denied to another class in the same business or calling, and which privileges and benefits so conferred on the favored class may be and are employed to impair and destroy the business of those belonging to the excluded class, is inhibited by the provisions of the Fourteenth Amendment to the National Constitution. And more especially must this be true, I think, in a case such as this, where the business conducted by the excluded class is not only of the same nature and character
86 as that transacted by the favored class, and is conducted in the same city, town or locality, and in competition one class with the other; but, further, where the class excluded from participating in the privileges and benefits of the act, was created for a public purpose, and the members are charged with the performance of important governmental functions requisite and necessary to be transacted promptly and efficiently in maintaining the stability, dignity, and perpetuity of the government itself. While it is true, such agencies created by the general government to assist in the discharge of its public governmental affairs, must, of necessity, come in competition with institutions transacting like business created by the several states, and must, when subjected to the enforcement of like and equal laws survive or perish as the transaction of their business may prove successful and profitable, or the reverse, yet it cannot be true that the States may, at will, either by virtue of direct legislative enactments, impair or destroy the efficiency or existence of such national institutions or indirectly by making institutions of their creation favorites of the law, confer such special privileges and

benefits on them that the national institution cannot in competition with them, endure. For, in the end, the great financial business interests of the people of this country, entrusted to the care and keeping of banking institutions, must depend for its security and prompt adjustment more on the known honesty, ability and conservatism of those in charge of the affairs of such institution than in the control exercised over them by law. Lasting financial security and permanent commercial prosperity has ever come and can only come to a state from confidence by man reposed in the honesty of purpose, the integrity of character, and the fidelity to duty of his fellowman. It can never come from the operation of unequal, unjust or partial laws.

As said by Mr. Justice White, in closing the opinion of the court in Davis v. Elmira Savings Bank, *supra:*

"Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purposes of Congressional legislation.

Much was said in argument as to the public policy embodied
87 in the laws of the State of New York and the wisdom of upholding it. Our function is judicial and not legislative. Did we, however, consider motives of public policy, we should not be unmindful of the wise safeguard, in favor of all the people of the United States, resulting from the provision which secures to every one dealing with a national bank, a ratable distribution of the assets thereof, thereby stimulating confidence and uniformity of treatment."

Or, as said by Mr. Justice Matthews, delivering the opinion of the court in Yick Wo v. Hopkins, *supra:*

"This conclusion and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so inequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within

the prohibition of the Constitution. The principle of interpretation has been sanctioned by this court in Henderson v. Mayor of New York, 92 U. S. 259; Chy Lung v. Freeman 92 U. S. 275; Ex Parte Virginia 100 U. S. 339; Heal v. Delaware, 103 U. S. 370; and Soon Hing v. Crowley, 113 U. S. 703."

It follows, from what has been said, the demurrers in cases
88 numbers 8810 and 8817 must be overruled and denied. And defendants are ruled to answer the bills in said cases, if so advised by their solicitors, by the January 1910 rules of this court. Failing to so answer, the bills will be taken as confessed.

Applications for temporary injunctions having been presented on due notice, and full argument by solicitors for the respective parties, and submitted for decision, with the demurrers to the bills, the application in case No. 8816 of the state banks, will be dismissed.

In case of Larabee, No. 8810, a temporary injunction will issue restraining the officials of the Bank, its officers, agents, servants and employés from further expenditure by the Bank in complying with the terms of the act, and from further compliance with the terms of the act. Also, restraining defendant, Mark Tulley, as treasurer of the state, from disbursing the moneys of the Bank in his hands to any person or persons except in restoring it to the custody of the Bank. And further restraining Joseph N. Dolley, bank commissioner of the state of Kansas, from issuing or delivering to the officials of the Bank any certificate of authority empowering the Bank to conduct its affairs under the provisions of the act, or from in any manner attempting to enforce the provisions of the act in question, or any of the same, against the Bank, its officers, agents, servants, employés or property, until the further order of this court, on the giving of a bond in the sum of five thousand dollars, to be approved by the clerk or judge of this court.

In case No. 8817, of the national banks, as the rights of complainants may not be protected in any other manner save by a broad decree a writ of temporary injunction will issue, as prayed in the bill, to remain in force until the further order of this court, on the giving and approval by the judge or clerk of this court of a bond in the penal sum of fifty thousand ($50,000) dollars, conditioned as by the law provided.

It is so ordered.

JOHN C. POLLOCK, *Judge.*

Kansas City, Kansas, December 23, 1909.

Endorsed: Nos. 8810, 8816, 8817. Opinion. Filed Dec. 23, 1909. Geo. F. Shariff, clerk.

89 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8816.

ASSARIA STATE BANK OF ASSARIA et al., Complainants,
vs.
JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas; Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

Order.

This cause having heretofore been argued, heard, submitted and taken under advisement upon the bill of complaint of the complainant herein as amended, and upon the demurrer of said defendants to said bill, the court having considered the same and being fully advised in the premises, it is now by the court on this 24th day of December, 1909,

Ordered That the said demurrer be, and the same is hereby sustained; and it is by the court further

Ordered That unless complainants apply for leave to plead further on or prior to the January 1910 rule day, said bill will stand as dismissed.

JOHN C. POLLOCK, *Judge.*

Approved as to form:
F. S. JACKSON, *Att'y Gen.*

Endorsed: No. 8816. In the Circuit Court of the United States for the District of Kansas, 1st Division. Assaria State Bank et al., Plaintiff-, vs. Joseph N. Dolley, as Bank Commissioner of State of Kansas, et al., Defendants. Order demurrer sustained. Filed December 24, 1909. Geo. F. Sharitt, clerk. Gleed, Ware & Gleed, Attorneys for Complainants, Topeka, Kansas.

90 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8816.

ASSARIA STATE BANK OF ASSARIA et al., Complainants,
vs.
JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas; Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

Order.

This cause having been heretofore argued, heard, submitted and taken under advisement upon the bill of complaint of the complainants as amended, and upon the application of the complainants for

a temporary injunction herein, and the court having considered the same and being fully advised in the premises, it is now by the court on this 24th day of December, 1909,

Ordered That said application for a temporary injunction be, and the same hereby is, denied.

JOHN C. POLLOCK, *Judge.*

Approved as to form:

F. S. JACKSON, *Att'y Gen.*

Endorsed: 8816. In the Circuit Court for the District of Kansas, 1st Division. Assaria State Bank et al., Plaintiff- vs. Joseph N. Dolley, as Bank Commissioner of State of Kansas, et al., Defendants. Order denying restraining order. Filed December 24, 1909. Geo. F. Sharitt, clerk. Gleed, Ware & Gleed, attorneys for Complainants, Topeka, Kansas.

91 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8816.

ASSARIA STATE BANK OF ASSARIA et al., Complainants,
vs.
JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas; Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

Decree.

Whereas on the 24th day of December 1909, it was ordered and decreed in the above entitled cause that the defendants' demurrer to the complainants' bill of complaint be sustained and that unless complainants should apply for leave to plead further on or prior to the January 1910 rule day, said bill should stand dismissed and;

Whereas said complainants have not made application to the court for leave to plead further in the premises;

It is therefore ordered that the complainants' bill of complaint be and the same is hereby dismissed at the cost of the complainants.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 8816. In the Circuit Court of the United States, District of Kansas, First Division. Assaria State Bank et al., Complainants, vs. Joseph N. Dolley, Defendants. Decree. Filed May 16, 1910. Geo. F. Sharitt, clerk.

92 In the Circuit Court of the United States for the District of Kansas, First Division.

ASSARIA STATE BANK OF ASSARIA, CITIZENS BANK OF AXTELL, Baileyville State Bank of Baileyville, First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank of Coats, State Bank of Colwich, Cloud County Bank, of Concordia; Danville State Bank, of Danville; State Bank of Downs, Downs; Union State Bank, of Downs; Falun State Bank of Falun; Marion County State Bank, of Florence; Ford State Bank, of Ford; Citizens State Bank, of Frankfort; Farmers State Bank of Greensburg; Citizens State Bank, of Grenola; Bank of Hamlin, of Hamlin; Farmers & Merchants State Bank, of Harper; Farmers State Bank, of Hazelton; Morrill and Janes Bank, of Hiawatha; State Bank of Holton, of Holton; State Bank of Home City, of Home City; Bank of Horton; Iuka State Bank, of Iuka; Jamestown State Bank, of Jamestown; State Bank of Jennings, of Jennings; State Bank of Lancaster, of Lancaster; Exchange Bank of Lenora; McPherson Bank, of McPherson, Citizens State Bank of Medicine Lodge; Muscotah State Bank, of Muscotah; Olsburg State Bank, of Olsburg; Peru State Bank, of Peru; First State Bank of Portis; Bank of Powhattan, Powhattan; Peoples Bank of Pratt; SharonValley State Bank of Sharon; South Haven Bank, of South Haven; Kendall State Bank of Valley Falls; Security State Bank, of Wellington; Wilmore State Bank, of Wilmore; Farmers State Bank, of Whiting; Willis State Bank, of Willis; Bank of Winchester, of Winchester; Citizens Bank of Hazelton, Complainants,

vs.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas, and Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

Assignment of Errors.

93 Comes now the above named complainants, Assaria State Bank of Assaria, Citizens Bank of Axtell, Baileyville State Bank of Baileyville, First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank of Coats, State Bank of Colwich, Cloud County Bank, of Concordia, Danville State Bank of Danville, State Bank of Downs, Downs, Union State Bank of Downs, Falun State Bank of Falun, Marion County State Bank of Florence, Ford State Bank of Ford, Citizens Bank, of Frankfort, Farmers State Bank, of Greensburg, Citizens State Bank of Grenola, Bank of Hamlin, of Hamlin, Farmers & Merchants State Bank of Harper, Farmers State Bank of Hazelton, Morrill and Janes Bank, of Hiawatha, State Bank of Holton, of Holton, State Bank of Home City, of Home City, Bank of Horton, Iuka State Bank, of Iuka, Jamestown State Bank, of

Jamestown, State Bank of Jennings, of Jennings, State Bank of Lancaster, of Lancaster, Exchange Bank of Lenora, McPherson Bank of McPherson, Citizens State Bank of Medicine Lodge, Muscotah State Bank, of Muscotah, Olsburg State Bank, of Olsburg, Peru State Bank, of Peru, First State Bank of Portis, Bank of Powhattan, Powhattan, Peoples Bank of Pratt, Sharon Valley State Bank of Sharon, South Haven Bank, of South Haven, Kendall State Bank of Valley Falls, Security State Bank, of Wellington, Wilmore State Bank, of Wilmore, Farmers State Bank of Whiting, Willis State Bank, of Willis, Bank of Winchester, of Winchester, Citizens Bank of Hazelton, and file the following assignment of errors:

First. That the said court erred in entering its decree and order sustaining the demurrer of the defendants and dismissing the complainants' bill of complaint.

Second. The said court erred in ruling that the complainants' bill of complaint did not set forth sufficient facts to entitle the said complainants to an order of injunction against the defendants as prayed in the said bill of complaint.

Third. The said court erred in holding that the complainant banks are not unduly and unlawfully discriminated against in violation of the Constitution of the United States by Chapter 61, Laws of 1909 of the State of Kansas, commonly known as the Bank Guaranty law of the State of Kansas.

Fourth. The said court erred in holding that because the
94 said complainant banks might accept the privileges of the Bank Guaranty Law of the State of Kansas, (Chapter 61, Laws of 1909) the complainant banks are not unlawfully and wrongfully discriminated against by the said Bank Guaranty Law, and, therefore can not be heard to complain of the said law.

Fifth. The said court erred in holding that the complainant banks which are disqualified from participating in the benefits of the Kansas Bank Guaranty Act, (Chapter 61, Laws of 1909) are not unlawfully and wrongfully discriminated against by the said Act.

Sixth. The said court erred in holding that the complainant banks are not discriminated against and their contract rights are not impaired on the ground that it is not averred in the bill of complaint that any of the banks in which the complainant banks have deposits, credits or contract obligations have failed, or their affairs about to be settled under the provisions of the Kansas Bank Guaranty Act.

Seventh. The said court should have found that Chapter 61, of the Laws of 1909 of the State of Kansas, commonly known as the Bank Guaranty Act of the State of Kansas, unjustly and unlawfully discriminated against each and all of the complainant banks, and deprived each and all of the complainant banks of property without due process of law, and was, and is, as to each of the complainant

banks, in violation of Section 10, of Article 1, of the Constitution of the United States, which forbids any state passing a law impairing the obligation of contracts, and in violation of Section 1 of Article 14, of Amendments to the Constitution of the United States, which provides that no state shall make or enforce any law which denies to any person within its jurisdiction the equal protection of the laws, and is in violation of Section 17 of Article 2 of the Constitution of the State of Kansas which provides: "all laws of a general nature shall have a uniform operation" throughout the state, and is in violation of Section 16 of Article 2 of the Constitution of the State of Kansas, which provides: "No law shall be revived or amended, unless the new act contain the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed," and by reason of the premises that (Chapter 61 of the Laws of 1909) of the State of Kansas, commonly known as
95 the Bank Guaranty Act of the State of Kansas is unconstitutional, null and void, and that its enforcement would result in damage and irreparable injury to the complainants and each of them.

CHESTER I. LONG,
JOHN L. HUNT,
J. W. GLEED,
Solicitors for Complainants.

B. P. WAGGENER,
JOHN L. WEBSTER,
Of Counsel.

Endorsed: No. 8816. In the Circuit Court of the United States, District of Kansas, First Division. Assaria State Bank et al., Complainants, vs. Joseph N. Dolley et al., Defendants. Assignment of Errors. Filed May 16, 1910. Geo. F. Sharitt, Clerk.

96 In the Circuit Court of the United States for the District of Kansas, First Division.

ASSARIA STATE BANK OF ASSARIA, CITIZENS BANK OF AXTELL, Baileyville State Bank of Baileyville, First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank of Coats, State Bank of Colwich, Cloud County Bank, of Concordia; Danville State Bank, of Danville; State Bank of Downs, Downs; Union State Bank, of Downs; Falun State Bank of Falun; Marion County State Bank, of Florence; Ford State Bank, of Ford; Citizens Bank, of Frankfort; Farmers State Bank of Greensburg; Citizens State Bank, of Grenola; Bank of Hamlin, of Hamlin; Farmers & Merchants State Bank, of Harper; Farmers State Bank, of Hazelton; Morrill and Janes Bank, of Hiawatha; State Bank of Holton, of Holton; State Bank of Home City, of Home City; Bank of Horton; Iuka State Bank, of Iuka; Jamestown State Bank, of Jamestown; State Bank of Jennings, of Jennings; State Bank of Lancaster, of Lancaster; Exchange Bank of Lenora; McPherson Bank, of McPherson, Citizens State Bank of Medicine Lodge; Muscotah State Bank, of Muscotah; Olsburg State Bank, of Olsburg; Peru State Bank, of Peru; First State Bank of Portis; Bank of Powhattan, Powhattan; Peoples Bank of Pratt; Sharon Valley State Bank of Sharon; South Haven Bank, of South Haven; Kendall State Bank of Valley Falls; Security State Bank, of Wellington; Wilmore State Bank, of Wilmore; Farmers State Bank, of Whiting; Willis State Bank, of Willis; Bank of Winchester, of Winchester; Citizens Bank of Hazelton, Complainants,

vs.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas, and Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

Petition for Allowance of Appeal.

97 The complainants, Assaria State Bank of Assaria, Citizens Bank of Axtell, Baileyville State Bank of Baileyville, First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank of Coats, State Bank of Colwich, Cloud County Bank, of Concordia, Danville State Bank of Danville, State Bank of Downs, Downs, Union State Bank, of Downs, Falun State Bank of Falun, Marion County State Bank of Florence, Ford State Bank of Ford, Citizens Bank, of Frankfort, Farmers State Bank of Greensburg, Citizens State Bank, of Grenola, Bank of Hamlin, of Hamlin, Farmers & Merchants State Bank of Harper, Farmers State Bank of Hazelton, Morrill and Janes Bank, of Hiawatha, State Bank of Holton, of Holton, State Bank of Home City, of Home City, Bank of Horton, Iuka State Bank, of Iuka, Jamestown State Bank of Jamestown, State Bank of Jennings, of Jennings, State Bank of Lancaster, of Lancaster, Exchange Bank of Lenora, McPherson Bank of McPherson, Citizens State Bank of

Medicine Lodge, Muscotah State Bank, of Muscotah, Olsburg State Bank, of Olsburg, Peru State Bank of Peru, First State Bank of Portis, Bank of Powhattan, Powhattan, Peoples Bank of Pratt, Sharon Valley State Bank of Sharon, South Haven Bank of South Haven, Kendall State Bank of Valley Falls, Security State Bank of Wellington, Wilmore State Bank of Wilmore, Farmers State Bank of Whiting, Willis State Bank of Willis, Bank of Winchester of Winchester, Citizens Bank of Hazelton, in the above entitled cause, feeling aggrieved by the order and decree of the court, entered on the 24th day of December, 1909, and on the 16th day of May, 1910, in the above entitled cause, pray for an order allowing an appeal from the said orders and decrees to the Supreme Court of the United States, and that an order be made fixing the amount of security which the complainants shall be required to furnish as a cost bond upon said appeal.

CHESTER I. LONG,
JOHN L. HUNT,
J. W. GLEED,
Solicitors for Complainants.

B. P. WAGGENER,
JOHN L. WEBSTER,
Of Counsel.

98 *Order Allowing Appeal.*

It is ordered that the appeal as prayed by the complainants is hereby allowed to the Supreme Court of the United States to review the orders and decrees heretofore entered in said cause and the amount of the cost bond is hereby fixed at $500.00.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 8816. In the United States Circuit Court, District of Kansas, First Division. Assaria State Bank et al., Complainants, vs. Joseph N. Dolley et al., Defendants. Petition for Allowance of Appeal. Filed May 16, 1910. Geo. F. Sharitt, clerk.

99 In the Circuit Court of the United States for the District of Kansas, First Division.

ASSARIA STATE BANK OF ASSARIA, CITIZENS BANK OF AXTELL, Baileyville State Bank of Baileyville, First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank of Coats, State Bank of Colwich, Cloud County Bank, of Concordia; Danville State Bank, of Danville; State Bank of Downs, Downs, Union State Bank, of Downs; Falun State Bank of Falun; Marion County State Bank, of Florence; Ford State Bank, of Ford; Citizens Bank, of Frankfort; Farmers State Bank of Greensburg; Citizens State Bank, of Grenola; Bank of Hamlin, of Hamlin; Farmers & Merchants State Bank, of Harper; Farmers State Bank, of Hazelton; Morrill and Janes Bank, of Hiawatha; State Bank of Holton, of Holton; State Bank of Home City, of Home City; Bank of Horton; Iuka State Bank, of Iuka; Jamestown State Bank, of Jamestown; State Bank of Jennings, of Jennings; State Bank of Lancaster, of Lancaster; Exchange Bank of Lenora; McPherson Bank, of McPherson, Citizens State Bank of Medicine Lodge; Muscotah State Bank, of Muscotah; Olsburg State Bank, of Olsburg; Peru State Bank, of Peru; First State Bank of Portis; Bank of Powhattan, Powhattan; Peoples Bank of Pratt; Sharon Valley State Bank of Sharon; South Haven Bank, of South Haven; Kendall State Bank of Valley Falls; Security State Bank, of Wellington; Wilmore State Bank, of Wilmore; Farmers State Bank, of Whiting; Willis State Bank, of Willis; Bank of Winchester, of Winchester; Citizens Bank of of Hazelton, Complainants,

vs.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas, and Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

Bond on Appeal.

Know all men by these presents that we, Assaria State Bank of Assaria, Citizens Bank of Axtell, Baileyville State Bank of
100 Baileyville, First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank of Coats, State Bank of Colwich, Cloud County Bank, of Concordia, Danville State Bank of Danville, State Bank of Downs, Downs, Union State Bank, of Downs, Falun State Bank, of Falun, Marion County State Bank of Florence, Ford State Bank of Ford, Citizens Bank, of Frankfort, Farmers State Bank of Greensburg, Citizens State Bank, of Grenola, Bank of Hamlin, of Hamlin, Farmers & Merchants State Bank of Harper, Farmers State Bank of Hazelton, Morrill and Janes Bank, of Hiawatha, State Bank of Holton, of Holton, State Bank of Home City, of Home City, Bank of Horton, Iuka State Bank, of Iuka, Jamestown State Bank of Jamestown, State Bank of Jennings, of Jennings, State Bank of Lancaster, of Lancaster, Exchange Bank

of Lenora, McPherson Bank of McPherson, Citizens State Bank of Medicine Lodge, Muscotah State Bank, of Muscotah, Olsburg State Bank, of Olsburg, Peru State Bank of Peru, First State Bank of Portis, Bank of Powhattan, Powhattan, Peoples Bank of Pratt, Sharon Valley State Bank of Sharon, South Haven Bank of South Haven, Kendall State Bank of Valley Falls, Security State Bank of Wellington, Wilmore State Bank of Wilmore, Farmers State Bank of Whiting, Willis State Bank of Willis, Bank of Winchester of Winchester, Citizens Bank of Hazelton, as principals, and E. E. Ames and J. R. Burrow as surety are held and firmly bound unto the defendants Joseph N. Dolley as Bank Commissioner of the State of Kansas, and Mark Tulley as State Treasurer of the State of Kansas, in the sum of Five Hundred Dollars to be paid to the defendants subject to the following conditions:

Whereas the complainants in the above entitled cause have sued out an appeal to the Supreme Court of the United States — reverse the orders and decrees entered in the United States Circuit Court for the District of Kansas, on the 24th day of December, 1909, and on the 16th day of May, 1910.

Now therefore, the condition of this obligation is such that if the said complainants shall prosecute said appeal to effect, and answer all costs if *it* fails to make said appeal good, then this obligation shall be void, otherwise to remain in full force and effect.

CHESTER I. LONG,
J. W. GLEED,
JOHN L. HUNT,
Solicitors for Complainant-.
E. E. AMES.
J. R. BURROW.

Approved.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 8816. In the Circuit Court of the United States, District of Kansas, First Division. Assaria State Bank of Assaria et al., Complainants, vs. Joseph N. Dolley et al., Defendants. Bond on Appeal. Filed May 16, 1910. Geo. F. Sharitt, clerk.

102 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a full, true and correct copy of the record and proceedings in said court in Case No. 8816 wherein Assaria State Bank of Assaria, et al., are complainants and Joseph N. Dolley as Bank Commissioner of the State of Kansas, et al., are defendants.

I further certify that the original Citation is hereto attached and returned herewith.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 18th day of June, A. D. 1910.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT, *Clerk*.

Endorsed on cover: File No. 22,238. Kansas C. C. U. S. Term No. 617. Assaria State Bank of Assaria, Citizens Bank of Axtell et al., appellants, vs. Joseph N. Dolley, as Bank Commissioner of the State of Kansas, and Mark Tulley, as State Treasurer of the State of Kansas. Filed June 23d, 1910. File No. 22,238.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 617

—o—

ASSARIA STATE BANK OF ASSARIA, CITIZENS BANK OF AXTELL, *et al.*, *Appellants*,

vs.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas, and MARK TULLEY, as state Treasurer of the State of Kansas.

Notice of Motion to Advance.

—o—

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

—o—

The appellants hereby give notice to the appellees in the above entitled cause that the said appellants have filed a motion in the Supreme Court of the United States to have the above entitled cause advanced to be argued in conjunction with *Noble State Bank vs. Haskell, et al.*, No. 71, and which motion will be called up for submission to the Supreme Court at the opening of its session in the City of Washington, beginning on October 10, 1910, or as

soon thereafter as the said court will entertain the submission of the same.

JOHN L. WEBSTER,
B. P. WAGGENER,
CHESTER I. LONG,
J. W. GLEED,
JOHN L. HUNT.

Service of the above notice, together with a copy of the motion to advance, is hereby accepted.

Dated this the 1st day of October, 1910.

FRED S. JACKSON,
Attorney General.
By JOHN MARSHALL,
Assistant Attorney General.

ALEX MITCHELL,
G. H. BEECKMAN,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 617

—o—

ASSARIA STATE BANK OF ASSARIA, CITIZENS BANK OF AXTELL, *et al.*, *Appellants*,

vs.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas, and MARK TULLEY, as State Treasurer of the State of Kansas.

Motion to Advance.

—o—

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

—o—

Now comes the appellants in the above entitled cause and move the court to advance this cause and set the same down for argument at the time the case of *Noble State Bank vs. Haskell, et al., No. 71, shall come on for hearing.*

Said case of *Noble State Bank vs. Haskell, et al.*, No. 71, October Term, 1910, is commonly known as the "Oklahoma Bank Guarantee Case" and involves an Act commonly known as the Oklahoma Bank Guarantee Law. The *Assaria State Bank of Assaria, et al., vs. Joseph N. Dolley, et al.*, involves the constitutionality of a statute of

Kansas commonly known as the "Kansas Bank Guarantee Act." As both cases involve the constitutionality of "Bank Guarantee Laws," the appellants herein deem it expedient that both cases should be argued at one and the same time, and to that end suggest this case be advanced to be heard with the Oklahoma case.

JOHN L. WEBSTER,
B. P. WAGGENER,
CHESTER I. LONG,
J. W. GLEED,
JOHN L. HUNT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 617.

ASSARIA STATE BANK OF ASSARIA, (and 46 other Kansas State Banks,) *Appellants,*
vs.
JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas, and MARK TULLEY, as State Treasurer of the State of Kansas, *Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

BRIEF FOR APPELLANTS.

IN SUPPORT OF THE CONTENTION THAT THE
KANSAS BANK GUARANTY LAW
IS UNCONSTITUTIONAL.

CHESTER I. LONG,
J. W. GLEED,
JOHN L. HUNT,
Solicitors for Appellants.

JOHN L. WEBSTER,
B. P. WAGGENER,
Of Counsel.

CRANE & CO., TOPEKA

In the Supreme Court of the United States,

October Term, 1910.

Assaria State Bank of Assaria, Citizens Bank of Axtell, Baileyville State Bank of Baileyville, First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank of Coats, State Bank of Colwich, Cloud County Bank, of Concordia, Danville State Bank, of Danville, State Bank of Downs, Downs, Union State Bank, of Downs, Falun State Bank, of Falun, Marion County State Bank, of Florence, Ford State Bank, of Ford, Citizens Bank, of Frankfort, Farmers State Bank, of Greensburg, Citizens State Bank, of Grenola, Bank of Hamlin, of Hamlin, Farmers & Merchants State Bank, of Harper, Farmers State Bank of Hazelton, Morrill and James Bank, of Hiawatha, State Bank of Holton, of Holton, State Bank of Home City, of Home City, Bank of Horton, Iuka State Bank, of Iuka, Jamestown State Bank, of Jamestown, State Bank of Jennings, of Jennings, State Bank of Lancaster, of Lancaster, Exchange Bank of Lenora, McPherson Bank, of McPherson, Citizens State Bank of Medicine Lodge, Muscotah State Bank, of Muscotah, Olsburg State Bank, of Olsburg, Peru State Bank, of Peru, First State Bank of Portis, Bank of Powhattan, Powhattan, Peoples Bank, of Pratt, Sharon Valley State Bank, of Sharon, South Haven Bank, of South Haven, Kendall State Bank, of Valley Valls, Security State Bank, of Wellington, Wilmore State Bank, of Wilmore, Farmers State Bank, of Whiting, Willis State Bank, of Willis, Bank of Winchester, of Winchester, Citizens Bank of Hazelton, *Appellants*,

vs.

Joseph N. Dolley as Bank Commissioner of the State of Kansas, and Mark Tulley as State Treasurer of the State of Kansas, *Appellees.*

No. 617.

Appeal from the Circuit Court of the United States for the District of Kansas—First Division.

BRIEF FOR APPELLANTS.

STATEMENT.

THE Kansas Legislature of 1909 passed a so-called Bank Guaranty Law, which went into effect June 30, 1909. (Sess. Laws of Kas. 1909, p. 96, Ch. 61; Gen. Stat. Kas. 1909, p. 129.)

On September 14th, 1909, three suits were commenced against the State Bank Commissioner and the State Treasurer, to enjoin them from proceeding under this law, on the ground that the law was unconstitutional. In one of these suits the Assaria State Bank and 46 other State banks were complainants; in another suit the Abilene National Bank and 142 other National banks were complainants; and in the other suit Frank S. Larabee, a dissenting stockholder in a State bank, was complainant. These suits were heard together in the trial court on demurrers to the bills and applications for temporary injunctions. In the suit brought by the State banks the demurrer was sustained and the application for a temporary injunction was denied. (175 Fed. 365), and complainants appealed directly to this court. That suit is No. 617, now before the court.

In the suit brought by the National banks the demurrer was overruled and the application for an injunction was allowed. (175 Fed. 365.) Defendants ap-

pealed to the Circuit Court of Appeals for the Eighth Circuit from the order allowing the injunction, and that order was there reversed. (179 Fed. 461.) The trial court then set aside the order overruling the demurrer, and entered a final decree sustaining the demurrer and dismissing the bill. Complainants then appealed from that decree to this court.

In the *Larabee* case the demurrer was overruled, and the bank in which Larabee was a stockholder was enjoined from participating under the law and the State officers were enjoined from allowing it to participate. (175 Fed. 365.) No appeal was taken by either party in that case.

The one principal issue in the case at bar is, of course, the constitutionality of the Bank Guaranty Law of Kansas. A statement of that law, therefore, together with a statement of the few facts alleged in the bill, will show the issues which were before the court below on the hearing of the demurrer, and which are brought here by this appeal.

The Kansas Bank Guaranty Law.

A copy of the law appears as an exhibit to the bill of complaint. (Rec., p. 19.) A carefully prepared digest of the law appears as an appendix to this brief.

The law in substance is as follows:

Certain classes of banks may apply to the Bank

Commissioner to have their depositors guaranteed, and if after examination the banks are found to comply with the requirements of the law, and upon the payment of assessments or premiums equal to one-twentieth of one per cent of their average deposits eligible to guaranty (less the amount of capital and surplus), and upon deposit "as an evidence of good faith" of bonds to the amount of $500 for every $100,000 of average deposits subject to guaranty (less capital and surplus), they receive a certificate from the Bank Commissioner that their depositors are guaranteed.

The banks whose depositors may be guaranteed under the law are:

A. Any *incorporated* State bank already doing business in this State,

Having a paid-up and unimpaired surplus equal to 10 per cent of its capital;

B. Any bank which may, after the passage of the act, be authorized to do business in this State,

Which shall have been actively engaged in the business of banking for at least one year,

Having a paid-up and unimpaired surplus equal to 10 per cent of its capital;

C. Any bank which may, after the passage of the act, be authorized to do business in this State,

Having a paid-up and unimpaired surplus equal to 10 per cent of its capital,

Doing business in a town in which all other banks shall have failed to become guaranteed banks within six months after the taking effect of this act,

Whether it has been actively engaged in business for one year or not.

No bank shall participate in the fund which—

Pays interest at a rate greater than 3 per cent per annum on any form of deposit;

Pays any interest on savings deposits withdrawn before July 1 or January 1 next following date of deposit; or

Pays interest on any time certificate cashed before maturity.

Existing contracts excepted from above.

Notwithstanding the fact that the certificate granted by the Bank Commissioner recites that its—

"Depositors are guaranteed by the Bank Depositors' Guaranty fund of the State of Kansas,"

the following classes of depositors are not secured:

Depositors who receive any interest on checking accounts.

Depositors receiving more than three per cent interest on time certificates.

Depositors holding time certificates under six months.

Depositors holding time certificates over one year.

Depositors holding time certificates where interest does not cease at maturity.

Depositors with savings accounts of any kind exceeding $100.

Depositors with savings accounts of any amount if subject to check.

Depositors with savings accounts of any amount whether subject to check or not if not subject to the sixty-day withdrawal clause.

Depositors whose deposits are primarily rediscounts.

Depositors whose deposits are primarily money borrowed by the bank.

Depositors who have any other security than the bank-guaranty law.

During January of each year the Bank Commissioner is required to make assessments of $\frac{1}{20}$ of 1 per cent of the average guaranteed deposits (less capital and surplus), and when the guaranty fund which is made up of these assessments is depleted he may make additional assessments of like amount not exceeding five assessments in any one year.

When any bank shall be found to be insolvent, the Bank Commissioner—

Shall take charge and wind up its affairs,

Shall issue to each depositor upon proof of claim a certificate bearing 6 per cent interest, except

Where a contract rate exists on the deposit the certificate shall bear the contract rate.

After the officer in charge shall have realized on the assets of the bank and exhausted the liability of its stockholders,

And shall have paid *all funds* so collected in dividends to the *depositors*,

He shall certify all balances due on guaranteed deposits to the Bank Commissioner,

Who shall draw checks on the State Treasurer, payable out of the Guaranty Fund for such balances.

If the Guaranty Fund together with the five authorized assessments shall be insufficient, the depositors shall be paid *pro rata*, and the balance shall be paid when the next assessment shall be available.

The State Printer is required to honor requisitions for the blanks and record books required by the Bank Commissioners and State Treasurer, and the work of administering the law rests upon the Bank Commissioner and State Treasurer and their office forces.

Section 13 of the Act is as follows:

> "After the passage of this act any National bank doing business in the State of Kansas, under the laws of the United States, *after an examination at its expense by the State Bank Comsioner*, and upon his approval as to its financial condition, may at its option participate in the assessments and benefits of the bank depositors' guaranty fund of the State of Kansas *upon the same terms and conditions as apply to State banks: Provided*, That such National bank shall forward to the Bank Commissioner of the State of Kansas detailed reports, in form to be provided by him, of its condition on the dates of the usual called statements of State banks (such report not to be published except at the option of the bank), *and shall submit to one examination each year by his department* (*or oftener in his discretion*) as provided by the banking laws of the

> State of Kansas, and pay the usual fee therefor. Should a National bank disregard or refuse to comply with any recommendation made by the Bank Commissioner, in conformity with the provisions of this act, it shall immediately be subject to the provisions and penalties of this act and its certificate of membership in the bank depositors' guaranty fund shall be canceled."

It is alleged in the bill that the amount in dispute exceeds $2000, exclusive of interest and costs (Par. II); that 13 of complainant banks have not a surplus equal to 10 per cent of their capital stock (Par. IX); that the effect of the act is to embark the State in the private business or pursuit of conducting a mutual insurance company; that there are more than 700 banks in the State whose depositors are entitled to the benefits of the act; and that the carrying on of this insurance scheme will be a great expense to the State, which expense can only be paid out of money raised by taxation (Par. XIV); that complainant banks and their shareholders are taxpayers (Par. XIV), and that all taxation for the purpose of carrying out this law will be taking property of complainants without due process of law; that the law discriminates against complainant banks and other classes of banks, and between depositors,

and against general creditors of banks as distinguished from depositors; and that—

> "The result of the enforcement of said law will be to either drive unguaranteed banks out of business and force them to liquidate and wind up their business, or to force banks which have not become guaranteed to make assessments on their stockholders for the purpose of raising a surplus fund equal to 10 per cent of their capital in case they have no such surplus fund, and to cease to pay more than 3 per cent interest on deposits of any kind, and to relinquish many other valuable rights guaranteed to them by the Constitution and laws of the State of Kansas and of the United States." (Par. IX.)

ASSIGNMENT OF ERRORS.

Appellants aver that there is error in the record and decree herein, as follows:

1. The court below erred in sustaining the demurrer of appellees to appellants' bill.

2. The court below erred in not overruling the demurrer of appellees to appellants' bill.

3. The court below erred in holding that it had no jurisdiction of this suit.

4. The court below erred in holding that because appellants could participate under the law complained of, they could not object to discrimination against them.

5. The court below erred in holding that appellant banks which have not a surplus equal to 10 per cent of their capital, and which may not therefore participate under the law, could not complain of the discrimination against them, because they could remove their disqualification by acquiring a surplus.

6. The court below erred in holding that it had no jurisdiction to enjoin taxation for the purposes of this law.

7. The court below erred in denying the temporary injunction prayed for in appellants' bill of complaint.

8. The court below erred in not holding that Chapter 61, Session Laws of Kansas of 1909, was, as against appellants, in contravention of the Constitution of the United States, and especially the Fourteenth Amendment thereof.

9. The court below erred in not holding that taxation of appellants for the purposes of this law would be in contravention of the Fourteenth Amendment to the Constitution of the United States.

10. The court below erred in dismissing this cause for want of jurisdiction.

11. The court below erred in entering its decree sustaining the demurrer of appellees and dismissing appellants' bill of complaint.

BRIEF.

I.

The Law is an Insurance Law and not a Banking Law.

The so-called Bank Guaranty Law is not a regulation of either banks or banking. It is a law creating an insurance scheme to be conducted by the State, the expenses of which are to be paid out of moneys raised by general taxation.

> *In re Right of National Banks to Participate in Kansas Bank Guaranty Law*, 27 Op. Atty.-Gen. 272.

The *Insurer* is the State.

The *Fund* for the payment of losses is derived from premiums paid by banks and the fund for the payment of expenses from general taxation. These expenses will largely exceed $28,000 per year, and will exceed the amount of annual premiums paid by all banks.

> Session Laws of Kansas, 1909, pp. 18 and 48.

The *Assured* are the depositors. Nothing in which the banks have any beneficial interest is insured.

The *Risk* is the obligation of the bank to certain depositors.

The *Loss* is the amount of deposits which the assets of the banks and the double liability of their stockholders is insufficient to pay.

The *Premium-payers* are banks (voluntarily) and taxpayers (compulsorily).

II.

Taxation.

Taxation for a private purpose is a taking of property without due process of law.

Brannon, Fourteenth Amendment, p. 160.
Cole v. LaGrange, 113 U. S. 1.
Loan Ass'n v. Topeka, 20 Wall. 655.
Cooley, Taxation, 67.
Sharpless v. Mayor, 59 Am. Dec. 759.

The law is not a police regulation. A statute to compel payment of debts is not a police regulation.

Gulf Ry. Co. v. Ellis, 165 U. S. 150.

This law acts by way of gift—by taking the property of one and giving it to another. Police power is simply the enforcement of the maxim, *Sic utere tuo, ut alienum non lædas*, and acts by way of restraint.

Tiedeman, Limitations of Police Power, § 1.
Freund, Police Power, §§ 3, 22, 8.

An exercise of the police power can be justified only by the needs of the public generally. This law benefits only a limited class of bank depositors.

Lawton v. Steele, 152 U. S. 133.
Hume v. Laurel Cemetery, 142 Fed. 553.
Colon v. Lusk, 153 N. Y. 188.

State v. Redmon, 134 Wis. 89.
Fisher v. Woods, 187 N. Y. 90.

The police power exists only where a necessity for its exercise exists. This law does not depend upon the necessity of those benefitted—the depositors—for its existence, because it may be put in action only by the voluntary act of private banking corporations.

Larabee v. Dolley, 175 Fed. 365.
Tiedeman, Limitations of Police Power, § 1.
Freund, Police Power, §§ 3, 8 and 22.
Lochner v. New York, 198 U. S. 45.
Chicago Ry. Co. v. Drainage Com'rs, 200 U. S. 561.
Lawton v. Steele, 152 U. S. 133.
Reduction Co. v. Sanitary Works, 199 U. S. 306.
Gardner v. Michigan, 199 U. S. 325.
Ritchie v. People, 155 Ill. 98.
People v. Stede, 231 Ill. 340.

The law is therefore not an exercise of the police power.—No other public purpose justifies it.

A public purpose is a governmental purpose.

Dodge v. Mission Twp., 107 Fed. 827, 830.

A governmental purpose is one for the accomplishment of which, as shown by history, governments were instituted.

Loan Ass'n v. Topeka, 20 Wall. 655.
Opinion of Justices, 30 N. E. (Mass.) 1142.

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Governments were not instituted for the purpose of insuring deposits or any other property interests.

Considered as an act for the relief of sufferers from bank failures or as an act to pay the debts of banks, the purpose of the act is private and not public.

Baltimore Ry. Co. v. Spring, 89 Md. 510.
State v. Township of Osawkee, 14 Kas. 418.
Lowell v. Boston, 111 Mass. 454.
Loan Ass'n v. Topeka, 20 Wall. 655.

Taxation for the purposes of this law is therefore taxation for private purposes.

This suit will lie. Power to do an act the expense of which can be paid only out of moneys to be raised by taxation, depends upon the power to tax.

Loan Ass'n v. Topeka, 20 Wall. 655.

A suit to prevent taxation because the taxation will be a taking of property without due process of law, involves a Federal question.

Fallbrook District v. Bradley, 164 U. S. 112.

Section 5148, Gen. Stat. Kas., 1905, provides:

> "An injunction may be granted to enjoin . . any public officer, board or body from entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge or assessment; and any number of persons whose property is or may be affected by the tax or assess-

ment so levied or whose burdens as taxpayers may be increased by the threatened unauthorized contract or act, may unite in the petition filed to obtain such injunction."

A suit may be brought on the equity side of the Federal courts under this statute without a showing of irreparable injury or other grounds of equity jurisdiction.

Cummings v. National Bank, 101 U. S. 153, 157.
Humes v. Little Rock, 138 Fed. 929.
Williams v. Crabb, 117 Fed. 193, 197.
Platt v. Lecocq, 158 Fed. 723.
San Francisco Bank v. Dodge, 197 U. S. 70.
Village v. Baker, 172 U. S. 269.
Crampton v. Zabriskie, 101 U. S. 601, 609.
McCulloch v. Brown, 23 L. R. A. (S. C.) 410.

The bill contains an allegation that the amount in controversy exceeds $2000, exclusive of interest and costs. This is admitted by the demurrers unless the allegations of fact in the bill show the contrary to a "legal certainty."

North American Co. v. City, 151 Fed. 120.
Barry v. Edmunds, 116 U. S. 550.

The amount in controversy is the whole expense of administering this law.

Gibson v. Shufeldt, 122 U. S. 27.
Western Tel. Co. v. Norman, 77 Fed. 13.
Brown v. Trousdale, 138 U. S. 389.

Johnson v. City, 106 Fed. 763.
Market Co. v. Hoffman, 101 U. S. 112.
Davies v. Corbin, 112 U. S. 36.

III.

Discrimination.

It is alleged in the bill that thirteen of complainant banks have not a 10 per cent surplus. The classification under this law is arbitrary and not reasonable as to these banks.

Classification must rest upon some difference which bears a reasonable and just relation to the act in relation to which the classification is proposed.

Gulf Ry. Co. v. Ellis, 165 U. S. 150, and cases there cited.
Atchison Ry. Co. v. Matthews, 174 U. S. 96.

Power to pass the law arises from the necessity for the law.

Lawton v. Steele, 152 U. S. 133, 137.
State v. Redmon, 134 Wis. 89.

The act is for the benefit of depositors. Depositors in banks which have no surplus and which are therefore presumably the weaker banks, need the benefits of the law more than depositors in stronger banks. A classification which deprives them of the benefits of the law has an unreasonable, rather than a reasonable relation to the object sought to be accomplished by the law.

The State had no power to pass the law, except in the interest of the public generally.

Lawton v. Steele, 152 U. S. 133, 137.
Hume v. Laurel Cemetery, 142 Fed. 552.
Colon v. Lusk, 153 N. Y. 188.
State v. Redmon, 134 Wis. 89.
Fisher v. Woods, 187 N. Y. 90.

It is as much in the interest of the public generally that depositors in banks without a 10 per cent surplus should be paid as that depositors in other banks should be paid.

State v. Goodwill, 33 W. Va. 179.

Although the act is for the benefit of depositors, they cannot get insurance directly, but only when some bank buys it for them. Banks without a 10 per cent surplus cannot buy insurance for their depositors. Other banks can offer the benefits of the law as a premium to depositors. The depositors are arbitrarily classed in such a way as to favor banks having a surplus and to injure banks having no surplus.

Classification in accordance with the peculiarities of the bank with which the depositor does business and not in accordance with the needs of the depositor is arbitrary.

State v. Haun, 61 Kas. 146, 153.

It is alleged in the bill that the effect of this arbitrary classification of depositors will be to deprive banks

having no surplus of their business and force them to liquidate. These allegations are admitted by the demurrer.

U. S. v. Des Moines Co., 142 U. S. 510, 544.
Denison Co. v. Thomas Co., 94 Fed. 651, 654.
City v. Beckham, 118 Fed. 399.
Humes v. City, 138 Fed. 929.
Lamson Co. v. Siegel Co., 106 Fed. 734.
State v. Arnold, 140 Ind. 628.
American Bank v. Bushey, 45 Mich. 135.
Hubbard v. Montgomery Co., 59 W. Va. 75.
Davies v. Hunt, 37 Ark. 574.
U. S. v. Williams, 28 Fed. Cas. 635.
State v. Kelley, 71 Kas. 811.

These allegations were not recklessly or improvidently made.

Report of Comptroller of Currency, 1909, pp. 25 to 29, 266 and 257, 22 and 23.

Deprivation of business is deprivation of property.

Osborn v. U. S. Bank, 9 Wheat. 738.

The law therefore deprives banks which have not a 10 per cent surplus of property without due process of law.

Hayes v. Missouri, 120 U. S. 68.
Yick Wo v. Hopkins, 118 U. S. 356.
Connolly v. Pipe Co., 184 U. S. 540.
Reagan v. Farmers Co., 154 U. S. 362.
Cotting v. Stock Yards, 183 U. S. 79.
State v. Goodwill, 33 W. Va. 179.
McKinster v. Sager, 163 Ind. 671.

As to banks which have a 10 per cent surplus, the alternatives offered are to refuse to insure their depositors and thus lose all their business, or to submit themselves to a law which will compel them—

Illegally to use the money invested by their stockholders;

Illegally to discriminate among their depositors; and

Illegally to discriminate between their depositors and their creditors.

Giving such banks the alternative of either being deprived of their property or of illegally conducting their business, is depriving them of their property without due process of law just as certainly as if they were not given the alternative of illegally conducting their business.

ARGUMENT.

I.

The Law is not a Law Regulating either Banks or Banking—It is an Insurance Law.

The law is not a regulation of either banks or banking; it is not, as was assumed by the Court of Appeals, (179 Fed. 465), a law "designed to improve banking "methods and to maintain the local institutions on a "sound basis"; it is not a law simply to grant new powers to banks or to change the charters of State

Banks or the laws under which they are incorporated. It is purely and simply a law creating an insurance scheme—a law providing for the payment of losses, not for the prevention of bank failures.

In his brief before the Attorney-General of the United States in the matter of the right of National Banks to participate under this Law, Attorney-General Jackson (John S. Dawson, of counsel) said:

> "Considering, therefore, the objections of the Attorney-General in their order, *we find that the Kansas law is purely and simply an insurance law. It authorizes the organization of a mutual insurance association and allows banks to become members thereof.* The liability is certain and fixed in annual premiums so long as the bank retains its membership. There is not the slightest element of guaranty in the proposition. The risk or amount of premium is fixed by considering the relation of capital and surplus to the amount of the deposits; *and as in all mutual insurance companies* the insured is liable only to pay the amount necessary to maintain the reserve and the actual loss, always of course within the limit of the premium prescribed (certificate of membership). *Approached from any way the Kansas law presents only insurance based on sound business principles.*" (Pp. 6 and 7.)

In the same brief the Attorney-General says further:

> "It does not answer this argument to say, as did the Attorney-General in the Oklahoma case,

that the National bank cannot enter into an insurance business or become a member of an insurance corporation, because under the Kansas law such argument would mean that the bank would be utterly powerless to insure any of its property or the fidelity of any of its officers in any mutual insurance company; and on this question I beg to incorporate a letter written on this subject by the Honorable Joseph L. Bristow, Senator from Kansas, to the Honorable Comptroller of the Currency, under date of March 24th: 'I have yours of March 23rd. In reply I beg to suggest that if it is unlawful for a National bank to join a *mutual insurance company* to insure its depositors,—for that is what the Kansas law creates,—then it is unlawful, also, I should think, for it to take out insurance on its buildings or fixtures in a mutual insurance company. All mutual insurance is an association for the purpose of protecting its members from loss. A bank may insure its property for twenty years, never have a loss, and all the money it contributes goes to pay for the losses of other people or other banks. The same is true of our Guaranty Deposit Law. The majority of the banks will not fail, just as the majority of banking houses do not burn. The assessments will depend upon the losses from failure the same as mutual assessments of fire and life insurance depend upon the losses by burning and death.' This seems to cover the subject fully. If the bank cannot participate in this class of insurance it cannot legally participate in many of the well-established classes of insurance in many of which the banks pay the pre-

> miums from their own assets. . . . We submit that no reason can be perceived in law or business policy why the bank should not be allowed to take out *insurance* against the possibility of loss to its depositors." (Pp. 8, 9, 12.)

In his opinion rendered April 6, 1909, after the hearing at which the brief above quoted from was filed, Attorney-General Wickersham said:

> "I am strongly of the opinion that a National bank is without corporate power to expend its moneys for the purpose of providing *insurance* that its depositors shall be paid in full. It may, of course, *insure* its own property against loss or destruction; it may *insure* itself against loss of property through theft or other dishonesty, but the application of its funds for the purpose of securing a collateral guaranty by third parties that it will pay in full its debts to its depositors is, it appears to me, beyond its corporate power. . .
>
> "But assuming that a National bank has corporate power to enter into a contract and pay a premium to *insure* to its depositors the payment in full of their deposits, the statute under consideration imposes," etc., etc.

In every insurance scheme there must be (*a*) an insurer with a fund applicable to the payment of losses; (*b*) an assured; (*c*) a risk; (*d*) a loss; and (*e*) a premium and a premium-payer.

The Insurer and the Fund. The insurer is the State.

It fixes the amount of the premium, examines the risk, collects the premium, conserves the fund created by the payment of the premiums, and investigates and pays the losses. None of the banks has anything to do with these matters.

The fund applicable to the conduct of this insurance scheme is derived from two sources—assessment of banks, and general taxation. The assessments provide the fund actually to be used in the payment of losses. Not one cent of this fund may be used to pay the expenses of conducting this insurance scheme.

The expenses of the scheme—the cost of investigating the risks, collecting the premiums, investing and reinvesting the funds, investigating and paying losses, and all other expenses usual to an insurance company—all these expenses are paid by general taxation. The materiality of this fact will clearly appear when it is realized that the law under consideration is not intended to prevent bank failures and has no tendency to prevent such failures. It simply provides for the payment of such debts as are left unpaid after the assets of a defunct bank are exhausted. It differs in no way, on principle, from a law providing for the payment by the State of the bad debts of a grocer or butcher or merchant of any kind.

In the case of an ordinary private insurance company

about one-half in amount of the premiums collected is required to pay the expenses of conducting the business and about one-half to pay losses. It is alleged in the bill of complaint (Par. XIV):

> "That the effect of said Bank Guaranty Act is to embark the State in the private business or pursuit of carrying on a mutual insurance company.
>
> "That said act requires the State Printer, at the expense of the State, to print and furnish forms and records to be used in carrying out said law, and requires the Bank Commissioner and his clerks and assistants and the State Treasurer and his clerks and assistants to employ the time for which they are paid by the State in carrying out the said law.
>
> "That there are more than 700 banks in the State of Kansas which are entitled to become guaranteed banks under said law, and that the carrying on of said mutual insurance scheme will be a great expense to the State, which can be paid only by money raised by taxation."

These allegations are of course admitted by the demurrer to the bill.

United States v. Des Moines Ry. Co., 142 U. S. 510.

That these allegations were not recklessly or improvidently made may be shown by acts of the Kansas Legislature, of which the court must take judicial notice. The Session Laws of Kansas for 1909, pp. 18 and 48,

show that the appropriations for the Bank Commissioner's office for the first biennium of the operation of this law are fifty-six thousand dollars larger than they were for the previous biennium; or twenty-eight thousand dollars per annum. His office force is augmented by an assistant commissioner and eight examiners. He himself must give much time to the scheme. The Attorney-General must act as his counsel. By Section 15 of the guaranty law itself the State Printer is required to furnish all necessary blanks and record books. The twenty-eight thousand dollars appropriated for each year is, therefore, a very small part of the expense caused to the State by the administration of this law. The $28,000 per year alone, however, equals the annual assessments, at the rate of 1-20 of one per cent as required by Sec. 3 of the law, on fifty-six million dollars of deposits subject to guaranty. The total amount of individual deposits and time certificates of State banks in 1908, as shown by the Bank Commissioner's report, was less than seventy-five million dollars. As more than one-third of the banks which held these deposits were not eligible to guaranty at all, because they did not have the requisite surplus, and as a great part of the deposits in the remaining banks drew interest or failed to comply with the guaranty law in other ways, and as the capital and surplus of these banks amount-

ing to over seventeen million dollars must be deducted from the amount of deposits subject to assessment, it is doubtful if there will ever be fifty-six million dollars of deposits subject to assessment. By paying the costs of running this insurance scheme, therefore, the State saves the beneficiaries at least half of its cost—the assessments would have to be at least twice as large if the concern were self-supporting. The law makes cheap insurance for a few favored depositors at the expense of the taxpayers.

The Assured. The assured are a part of the depositors, whose deposits are not otherwise secured, in incorporated *State* banks which have a paid-up and unimpaired surplus equal to 10 per cent of their capital, and which have been in business more than one year. Here again let us remind the court that the purpose and effect of this law is not to prevent bank failures, but to repay to depositors amounts already lost by the failures of banks. It is undoubtedly to be regretted that depositors should be unable to collect money due them from banks, but it is equally to be regretted that a wholesaler should lose money through the failure of the retailer to whom he has sold goods, or that any creditor should lose money through the failure of his debtor. And there is no more reason why the State should pay one class of debts than another. However

this may be, the depositors and not the banks are the assured. The banks get no insurance either directly or indirectly. After the failure has occurred, and the bank has closed its doors and a receiver has been appointed, and the receiver has distributed all the assets of the bank and has exhausted the double liability of the stockholders and distributed the amounts so raised —after all this the State steps in and pays to certain of the depositors the amounts of their deposits left after the application thereto of the assets of the bank. The depositors and not the banks are therefore the assured.

The Risk. The risk is of course the indebtedness of the bank to the depositor. The law does not insure anything in which the banks have a beneficial interest. No bank could be made one cent richer by the payment of the insurance.

The Loss. The loss is the amount of the deposit of the depositor which the assets of the bank are, after insolvency, insufficient to pay. The purpose and effect of the law is not to *prevent* these losses, but to *pay* them. The bank sustains no loss which is covered by the insurance and gets no part of the insurance money.

Thus far it must be admitted that the law contains no features of bank or banking regulation. A law pro-

viding a fund to be used in repaying to wholesale merchants amounts lost through the failure of retail merchants would not be a police regulation or any other kind of a regulation of retail merchants.

The Premium and the Premium-payer. Under this law the insured—the depositor—is not permitted to pay the premium (unless he is a taxpayer, and in that case he is *compelled* to pay a part of the premium). The bank pays the premium for the depositor's insurance. This is the only possible excuse to be found in the whole law for calling it a regulation of either banks or banking.

II.

Taxation.

It is alleged in the bill of complaint (Par. XIV):

> "That the State of Kansas and the Legislature thereof have no power to embark in the private business of insurance or to expend money of the State raised by taxation in carrying on mutual insurance companies, and that all money used in the carrying out of said scheme will be taken from the taxpayers of the State of Kansas without due process of law, and the effect of said act will be to deprive the taxpayers of Kansas of property without due process of law.
>
> "That your orators and their respective shareholders are taxpayers, and have paid large sums of money into the general revenue fund of the

> State on account of levies and assessments made against the real estate owned by your orators, and on account of their capital stock, and will be required to continue to make such payments, and that such funds have been and are being paid out by the defendants, and, unless enjoined, will continue to be paid out in connection with the operation and enforcement of said Chapter 61, Laws of 1909."

We have already pointed out that the expense to the State of administering this insurance scheme will be considerable. If this money is spent for a *private purpose* as distinguished from a *governmental purpose*, taxation for that purpose will be a taking of property without due process of law.

In Brannon's Treatise on the Fourteenth Amendment, p. 160, the author says:

> "It will appear from authorities above that the State power of taxation is very wide; but wide as this power is, still it is not utterly without limits; *it can be exercised only for public ends. Taxation for any other purpose would take property without due process of law, contrary to the Fourteenth Amendment.* 'The general grant of legislative power in the constitution of a State does not authorize the legislature, in the exercise of either the right of eminent domain or of taxation, to take private property without the owner's consent for any but a public object.

The legislature of Missouri has no constitutional power to authorize a city to issue bonds by way of donation to a private manufacturing corporation.' (*Cole v. LaGrange*, 113 U. S. 1.)

" 'There is no such thing in the theory of our governments, State or National, as unlimited power. The executive, the legislative and the judicial departments are all of limited and defined powers. There are limitations of such powers which arise out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. *Among these is the limitation of the right of taxation, that it can only be used in aid of a public object, an object within the purpose for which governments are established. It cannot be used in aid of a private enterprise.*' (*Loan Association v. Topeka*, 20 Wall. 655.)

"The last case cited holds, as many others do, that whether exactions from the people are lawful taxation, is ultimately a judicial question for the courts. Such exaction, not lawful taxation, would be a deprivation of property without due process, violative of State constitutions and the Fourteenth Amendment. (Cooley on Taxation, 67; *Sharpless v. Mayor*, 59 Am. Dec. 759.)"

The Law is not a Police Regulation.

We have already pointed out that the law is not a regulation of banks or banking. It is equally clear

that it is not a proper exercise of the police power for any purpose. It provides simply for the payment of certain classes of debts.

> "A mere statute to compel the payment of indebtedness does not come within the scope of police regulation." *Gulf Ry. Co. v. Ellis*, 165 U. S. 150.

The purpose of the act is not to prevent pauperism. A depositor might be totally unable to care for himself, but if he lost all of his money through the failure of a State bank which did not have a 10 per cent surplus and became a charge upon the public, this law would not help him. Another depositor might be worth millions and lose a hundred dollars through the failure of a State bank which had such a surplus, but if he belonged to a favored class of depositors his deposit would be repaid to him by the State. The act certainly cannot be sustained as a police regulation on the ground that it is intended to prevent pauperism.

The act in its last analysis simply provides for the payment of private debts by the State, in part out of money raised by taxation and in part out of money raised by assessment of banks. That there is no element of police power in this, see—

> *State v. Township of Osawkee*, 14 Kas. 418, per Brewer, J.
> *Loan Ass'n v. Topeka*, 20 Wall. 655.

Lowell v. Boston, 111 Mass. 454.
Baltimore Ry. Co. v. Spring, 89 Md. 510.

Quotations from these cases appear, *infra*.

The act does not help the depositor until the bank is absolutely defunct and its assets all distributed. It cannot be said, therefore, that it has a tendency to prevent bank failures. It was contended in the court below that the act would have a tendency to prevent runs on banks because the depositors would be assured of getting their money in the end, and that therefore the act could be sustained as a police regulation. We submit, however, that the possibility of ultimately getting deposits paid after the slow process of winding up the affairs of the bank through a receivership would not prevent runs, and that even the prevention of runs would not justify the payment of private debts by the State.

It is true that the act provides for the inspection of banks by the State, but this is a mere incident to the insurance feature. Such inspections can as well be had, and were had before the enactment of the law, without the insurance feature.

Finally, the law is remedial and not preventive—it acts by way of gift and not by way of restraint or compulsion. This clearly shows that it involves the exercise of no part of the police power of the State.

In Tiedeman, Limitations of Police Power, page 4, section 1, the author says:

> "In the present connection, as may be gathered from the American definitions heretofore given, the term [police power] must be confined to the imposition of *restraints and burdens* upon persons and property."

In Freund on Police Power, section 3, the author says:

> "From the mass of decisions in which the nature of the power has been discussed and its application either conceded or denied, it is possible to evolve at least two main attributes or characteristics which differentiate the police power: It aims directly to promote and secure the public welfare, and it does so by *restraint and compulsion.*"

In section 22 of the same work it is said:

> "The police power *restrains and regulates* for the promotion of the public welfare the natural or common liberty of the citizen in the use of his personal faculties and of his property."

The police power proper is in essence an extension of the doctrine," *Sic utere tuo, ut alienum non lædas.*" It means, Restrict the use of your property; not, Give your property to another.

> "It is to be observed, therefore, that the police power of the government, as understood in the

constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common law as well as the civil-law maxim, *Sic utere tuo, ut alienum non lædas.*

Tiedeman, Limitations on Police Power, § 1.

Freund (Police Power, § 8) says further:

"Thus most of the self-evident limitations upon liberty and property in the interest of peace, safety, health, order and morals are punishable at common law as nuisances. It is with reference to these obvious restraints that the maxim has been proclaimed: *Sic utere tuo, ut alienum non lædas.*

"But no community confines its care of the public welfare to the enforcement of the principles of the common law. The State places its corporate and proprietary resources at the disposal of the public by the establishment of improvements and services of different kinds; *and it exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common-law rights, through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of State control which constitutes the essence of the police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of the abuse of these rights on the part of those who are unskilful, careless or unscrupulous.*"

In *Lawton v. Steele*, 152 U. S. 133, this court, referring to the police power, said:

> "To justify the State in thus interposing its authority in behalf of the public *it must appear, first, that the interests of the public generally as distinguished from those of a particular class require such interference;* and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."

See also—

Hume v. Laurel Hill Cemetery, 142 Fed. 552, 565.
Colon v. Lusk, 153 N. Y. 188, 196.
State v. Redmon, 134 Wis. 89.
Fisher v. Woods, 187 N. Y. 90, 94.

The *prevention* of bank failures may fairly be said to be required by the interests of the public at large, but the payment of private debts due to a limited class of creditors is clearly demanded only by the interests of those creditors and in no wise benefits the public.

Moreover, the police power exists only where a reasonable necessity for its exercise in the interests of the public at large exists. It is the law of necessity. Here, the benefits of the law are conferred upon a limited class of depositors only. Their right to the benefits depends upon the voluntary action of banks. A law which can be put into action only by the voluntary action of

private corporations which are not benefitted by the law cannot be said to be the law of necessity.

On this point the trial court said (175 Fed. 365):

> ". . . One thing is clear: the act being permissive only, and not compulsory, and depending on its acceptance by the person to be bound thereby, and not alone on the law-making will, the source of its authority may not be traced to the exercise of the police power of the State. For, the police power of the State is a power resorted to of necessity in the protection and promotion of the health, comfort, safety and welfare of society. Being a law of force and necessity, of restraints and prohibitions, it may not be by the State committed to the judgment of the citizen to determine whether he will or will not be bound by its exercise. (Tiedeman, Limitations of Police Powers, § 1; Freund on Police Power, §§ 3, 8 and 22; *Lochner v. New York*, 198 U. S. 45; *C. B. & Q. Railway v. Drainage Comm's*, 200 U. S. 561; *Lawton v. Steele*, 152 U. S. 133; *Reduction Company v. Sanitary Works*, 199 U. S. 306; *Gardner v. Michigan*, 199 U. S. 325; *Ritchie v. People*, 155 Ill. 98; *People v. Steele*, 231 Ill. 340.)"

The Purpose Intended by the Act is a Private and not a Public Purpose.

> "A public purpose is a governmental purpose, one of the purposes for which governments are instituted and maintained among men."
>
> *Dodge v. Mission Twp.*, 107 Fed. (C. C. A., 8th Cir.) 827, 830.

What is or is not a public or governmental purpose is largely a question of history. The question is, Was the purpose one for the accomplishment of which governments were formed? If it was, then it is a public or governmental purpose; if not, it is not.

In *Loan Ass'n v. Topeka*, 20 Wall. 655, the court said:

> "In deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

In *Opinion of Justices*, 30 N. E. (Mass.) 1142, 1144, the justices said:

> "Constitutional questions concerning the power of taxation, necessarily, are largely historical questions. The constitution must be interpreted, as any other instrument, with reference to the circumstances under which it was framed and adopted. It is not thought necessary to show that the men who framed it or adopted it had in mind

everything which by construction may be found in it, but some regard must be had to the modes of thought and action on political subjects then prevailing; to the discussion upon the nature of the government to be established; to the meaning of the language used, as then understood; and to the grounds on which the adoption or rejection of the constitution was advocated before the people. We know of nothing in the history of the adoption of the constitution that gives any countenance to the theory that the buying and selling of such articles as coal and wood for the use of the inhabitants was regarded at that time as one of the ordinary functions of the government which was to be established. There are nowhere in the constitution any provisions which tend to show that the government was established for the purpose of carrying on the buying and selling of such merchandise as at the time when the constitution was adopted was usually bought and sold by individuals, and with which individuals were able to supply the community, no matter how essential the business might be to the welfare of the inhabitants. The object of the constitution was to protect individuals in their rights to carry on the customary business of life, rather than to authorize the commonwealth or the 'towns, parishes, precincts, and other bodies politic,' to undertake what had usually been left to the private enterprise of individuals."

Eliminate from the act in question the provision giving banks authority to pay the premium for the

insurance of their own obligations to their depositors, and all that directly affects banking has been eliminated. The act does not provide that banks shall not pay more than 3 per cent interest on deposits. It provides only that deposits in such banks may not be insured. It does not provide that every bank shall have a 10 per cent surplus, but provides simply that deposits in such banks are risks which may not be insured in this scheme. It does not provide that banks must be inspected, but provides that when a bank seeks to insure its own debts the risk must be examined, and that when it fails to pay its assessments the risk shall be again examined. Now admitting that the State may directly forbid banks to pay more than 3 per cent interest or to do business without a 10 per cent surplus and that it may inspect banks, it cannot justify a voluntary insurance scheme carried on at public expense on the ground that as a part of that scheme these things are forbidden or required. It is clear, therefore, that the act puts the State in the insurance business. It is equally clear that the insurance business is not one of the purposes for the accomplishment of which governments were instituted.

The purpose to be accomplished through this insurance scheme is to pay private debts due to private

individuals from private corporations. This is not a public purpose.

Baltimore & Eastern Shore R. Co. v. Spring, 89 Md. 510, 27 L. R. A. 72, involved the constitutionality of a statute authorizing county bonds to be issued for the benefit of an insolvent railroad company upon the condition that claims against the railroad, held by *bona fide* residents of the county, should be first paid. The court held that the purpose of the act was to pay to the inhabitants of the county the indebtedness due them by the insolvent railroad; that this was a private purpose for which taxes could not be laid, and that therefore the issue of the bonds might be enjoined, as is shown by the following, quoted from pages 73 and 74 of the L. R. A.:

> "The purpose of this act was not to aid in the construction of the road, because the road was then completed; nor even to pay debts incurred in the construction, for the beneficiaries of the act were all those who being residents of Talbot county held 'proper and legal claims' against the company, and this included all claims whether incurred by the company in constructing the road or otherwise. That the subscription was to be made to enable the county to discharge an obligation imposed upon it by the requirements of good faith, was, as we have seen, founded upon an assumption, and absolutely false. The conclusion seems to be inevitable that the effect and

scope of the act is simply *to levy a tax upon the property of the citizens of Talbot county, to pay to certain residents of that county the claims due to them by an insolvent railway company. This si a private purpose, and not one of the objects of taxation.* By the Declaration of Rights, article 15, as well as by the fundamental maxims of a free government, taxes can only be imposed to raise money for public purposes. 'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes.' Cooley Const. Lim. 479. If it be necessary to cite authorities to maintain this thoroughly established principle the following may be mentioned: *Citizens Sav. & Loan Assn. of Cleveland, Ohio, v. Topeka*, 87 U. S. 20 Wall. 655, 22 L. ed. 455; *Cole v. LaGrange*, 113 U. S. 1, 28 L. ed. 896; Cooley Const. Lim. (488), and authorities there cited; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Sharpless v. Philadelphia*, 21 Pa. 168; 59 Wis. 652; 88 Am. Dec. 711; *St. Mary's Industrial School v. Brown*, 45 Md. 337."

Even considered as an act for the relief of sufferers from bank failures, the purpose of the act would be private and not public.

In *State v. Township of Osawkee*, 14 Kas. 481, the act under consideration provided for the loan of public money to grasshopper sufferers for the purpose of buying seed grain. In that case Mr. Justice BREWER said:

"The relief of the poor, the care of those who

are unable to care for themselves, is among the unquestioned objects of public duty. In obedience to the impulses of common humanity, it is everywhere so recognized. Our own Constitution but gives utterance to the universal voice when it says: 'The respective counties of the State shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity, or other misfortune, may have claims upon sympathy and aid of society.' (Article 7, Sec. 4.) It must be borne in mind, however, that the term 'poor' is used in two senses. We use it in one sense simply as opposed to the term 'rich.' Thus we speak of the ordinary laborers, mechanics and artisans as poor people, without a thought of describing persons who are other than self-supporting. Indeed, the large majority of our people are poor people, and yet they would feel insulted to be told that they are objects of public charity. We use the term also to describe that class who are entirely destitute and helpless, and therefore dependent upon public charity. The dictionaries recognize this two-fold sense. Thus, Webster gives these definitions: '1. Destitute of property; wanting in material, riches, or goods; needy, indigent. It is often synonymous with "indigent," and with "necessitous," denoting extreme want. It is also applied to persons who are not entirely destitute of property, but who are not rich; as, a poor man or woman; poor people. 2. (Law.) So completely destitute of property as to be entitled to maintenance from the public.' Now, when we

speak of the relief of the poor as a public duty, and one which may justify taxation, we use the term only in the latter sense. We have no thought of asserting that because a man is not rich, or even because he has nothing but the proceeds of his daily labor, therefore taxation may be upheld in his behalf. Such taxation would be simply an attempt on the part of the State to equalize the property of its citizens. Something more than 'poverty,' in that sense of the term, is essential to charge the State with the duty of support. It is, strictly speaking, the pauper, and not the poor man, who has claims on public charity. It is not one who is in want merely, but one who being in want, is unable to prevent or remove such want. There is the idea of helplessness as well as of destitution. We speak of those whom society must aid, as the dependent classes, not simply because they do depend on society, but because they cannot do otherwise than thus depend. Cold and harsh as the statement may seem, it is nevertheless true, that the obligation of the State to help is limited to those who are *unable* to help themselves. It matters not through what the inability arises—whether from age, physical infirmity, or other misfortune,—it is enough that it exists. It is doubtless true, that in the actual administration of the poor-laws, many who are not properly entitled thereto receive public support; but failures in the administration of laws do not change the principles upon which they must rest. It is important to bear this distinction in mind, for, as will appear here-

after, it is really the former, and not the latter class which is sought to be relieved under this law. . . .

"The purpose of the act, as expressed in the section quoted, is to provide the destitute with provisions, and with grain for seed and feed. This legislation must be construed in the light of known facts. For reasons unnecessary to recount, in some portions of the State last season there was a total, and in others a partial, failure of the crops. It was generally understood that many farmers would come to this spring's sowing with little or no seed, and with stock weakened for lack of grain. To make good this lack is the evident purpose of the act,—to provide grain for seed and feed. Its aim is not to furnish food to the hungry, clothing to the naked, or fuel to those suffering from cold. It is not the helpless and dependent whose wants are alone sought to be relieved. If it were, the fact that many who are neither helpless nor dependent might obtain assistance through its administration, would be no valid objection to the constitutionality of the law. It contemplates a class who have fields to till and stock to care for, and purposes to help them with seed for their fields and grain for their stock, that thus they may pursue with better prospects of success their ordinary avocations. It taxes the whole community to assist one class, and that, not for the purpose of relieving actual want, but to assist them in their regular occupations. These people are engaged in the business of farming. This business cannot be success-

fully carried on without seed, nor without stock strong enough to do the ordinary work. They are destitute of seed, and their stock require grain. Hence the tax upon the community. The principle would be the same if their supply of grain was sufficient, but, through the prevalence of the epizooty, or some other disease, their stock had all died. Could a tax be sustained to purchase stock for their ordinary farm work? Or, again suppose some prairie-fire, driven by a fearful wind, sweeps through a county, consuming its fences and farming tools: can a tax be sustained to supply this loss, and enable the farmers to prosecute their labors? Nor need the inquiry be limited to a single class. Were the carpenters or shoemakers, or any other industrial class, located in a separate quarter of a city, and their tools and stock in trade swept away by fire, could a tax be sustained to purchase new sets of tools, and new stock in trade, to enable them to reprosecute their business and secure support for themselves and families? No distinction in principle can be made between these different supposed cases and the case at bar. They all rest upon this proposition: that a tax is laid upon the public to furnish to one class the means of carrying on its regular occupation. A further examination of this act will but strengthen the views herein expressed. The four succeeding sections are as follows. . . .

"These various provisions show that the idea of the legislature was not the relief of the helpless and dependent, but the assistance of a class tem-

porarily embarrassed. The recipient is required to make oath that he is buying the aid for himself, and not on a speculation. He is to give a note for the amount received, and if a married man, the note must also be signed by his wife. The note is to bear the same date, and draw the same interest, as the bonds, and the interest is payable at the same time as the interest on them. This note is to be a mortgage as well, and the most sweeping kind of a mortgage too, embracing all the real and personal property of the maker, whether owned at the time of its execution or subsequently acquired. And, finally, it is made the express duty of the township treasurer to see to the collection of this note, and to take all proper and needful action therefor. Nothing is contemplated but a loan, and a secured loan at that. The credit of the township is invoked to procure funds for the accommodation of a single class temporarily, and through unexpected calamity, embarrassed in the prosecution of its ordinary business. *Can this be called a public purpose? Clearly not.* It would doubtless relieve the temporary wants of that class, would enable it to enter upon the business of the year with increased hope, and a reasonable expectation of ordinary success in that business, and thus indirectly result in great benefit to the general public. But a similar result would follow the success and prosperity of any other class in business. And if the principle be once recognized in its application to this class, who can tell how soon it may be invoked in aid of another? If one hundred farmers may receive seventy-five dollars each to assist them

in their farming, why may not one hundred mechanics with equal propriety receive seventy-five dollars each to assist them in their business? or a single manufacturer, who employs one hundred hands, receive seventy-five hundred dollars to assist him in his manufacturing? A difference in amount makes no difference in the principle."

There is no difference in principle between giving money to sufferers from crop failures and giving money to sufferers from bank failures.

In *Lowell v. Boston*, 111 Mass. 454, the statute under consideration provided aid for the sufferers from the Boston fire in 1872. In that case the court said:

"*An appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The distinction between this and its appropriation for the construction of a highway is marked and obvious. It is independent of all considerations of resulting advantage. The individual, by reason of his capacity, enterprise or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. In this view, it might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital and entrust it to others who will use it to better advantage for the interests of the com-*

> *munity. But it needs no argument to show that an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation."*

In *Loan Ass'n v. Topeka*, 20 Wall. 655, 665, the statute under consideration provided for municipal aid to a private manufacturing corporation. In that case the court said:

> "But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

Under these authorities there can be no doubt that if the State provided the fund that was to be paid over to losing depositors the act would be unconstitutional, because the public fund would be paid out for a private

purpose. The use of State money for the purpose of administering this fund and making the examinations of banks called for by the act—for carrying on this insurance company—is just as much the use of public funds for a private purpose.

Taxation to pay private debts cannot, therefore, be called taxation for a public purpose. It follows that taxation for the purpose of raising money to carry on an insurance company is not taxation for a public purpose.

This Suit will Lie to Prevent Taxation for a Private Purpose.

Since taxation for a private purpose is a taking of property without due process of law, this suit in its taxation aspect falls directly under the 14th Amendment, and there is therefore involved in this suit a Federal question which fixes the jurisdiction of this court.

Fallbrook District v. Bradley, 164 U. S. 112.

But this suit is brought not alone to prevent such taxation, but also to prevent such use of public funds for private purposes as will result in such taxation.

> "The proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in the future, not limited to payments from some other source, imply an obligation to pay by

> taxation. . . . The validity of a contract which can only be fulfilled by a resort to taxation, depends on the power to levy the tax for that purpose."
>
> *Loan Ass'n v. Topeka*, 20 Wall, 655, 659.

We say, therefore, that the validity of a law that can be carried out only by a resort to taxation depends upon the power of the State to tax for that purpose.

This case does not fall within the doctrine of such cases as *McCain v. City*, 174 U. S. 168, and *Owensboro Water Works Co. v. City*, 200 U. S. 38, as seems to have been assumed by the trial court. In the McCain case the City, in a method which it was claimed was contrary to the constitution of the State, attempted to annex territory and to tax the territory annexed. It was contended that because the annexation was contrary to the constitution of the State, the taxation was void, and that void taxation was a taking of property without due process of law. The court held, however, that the question was the validity of the annexation under the State laws, and that this was not a Federal question; the court saying:

"It is therefore quite plain that the complainants base their case upon the allegation that their property is about to be taken from them by the City authorities without due process of law, and in violation of the Constitution of the United States, because the act of 1890

violates the Constitution of Iowa. That is a question of law, depending for its solution upon the law of Iowa, and as to what that law is the Federal courts are bound in such a case as this by the decision of the State tribunal. There is no construction of the Federal Constitution involved in that inquiry, nor any question as to its effect upon the complainants' rights in this suit. The question whether their property is taken without due process of law must be decided with sole reference to the law of Iowa."

In *Owensboro Water Works Co. v. City*, 200 U. S. 38, *supra*, the City was authorized to raise $200,000 by the issue of bonds for the purpose of constructing water-works, but by manipulation of the bonds proposed to raise $244,000. The bonds could be paid only by taxation. It was contended, as in the case last referred to, that because the manipulation of the bonds was contrary to the laws and constitution of the State, taxation for the purpose of paying the bonds would be a taking of property without due process of law. In that case the court said:

"It is not contended that the legislative enactments by the authority of which the city intends to establish and maintain a system of water-works are inconsistent either with the constitution of Kentucky or the Constitution of the United States. The plaintiff, however, complains that the defendant City has not properly discharged its duties under the laws of the State. For the purposes of the present discussion, let this be

taken as true; still, maladministration of its local affairs by a city's constituted authorities cannot rightfully concern the national government unless it involves the infringement of some Federal right. . . .

"As between citizens of the same State the Federal court may not interfere to compel municipal corporations or other like State instrumentalities to keep within the limits of the power conferred upon them by the State, unless such interference is necessary for the protection of a Federal right."

In the case at bar it is not contended that the expenditure of money for the purposes of this act or that taxation for the purpose of raising such money will be contrary to the State laws only. It is contended that expenditure of money for the purposes of this law is expenditure of money for a private purpose only, and that taxation for the purpose of raising such money is a taking of property for a private purpose and therefore a taking of property without due process of law, contrary to the Fourteenth Amendment.

In the cases cited there was a taking of property for a public purpose but contrary to a State law, and therefore the only question involved arose under the State law. In the case at bar there is a taking of property for a private purpose, and therefore contrary to the Fourteenth Amendment, and the only question involved arises under the Fourteenth Amendment.

Sec. 5148, Gen. Stat. of Kansas 1905, is as follows:

> "An injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same *or to enjoin any public officer, board or body from entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge or assessment;* and any number of persons whose property is or may be affected by the tax or assessment so levied or whose burdens as taxpayers may be increased by the threatened unauthorized contract, or act, may unite in the petition filed to obtain such injunction."

Suits may be brought under this section in the Federal courts. In *Cummings v. National Bank*, 101 U. S. 153, 157, the Supreme Court said of a similar statute:

> "But the statute of the State expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments or the collection of them. And though we have repeatedly decided in this court that the statute of a State cannot control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that where a statute of a State created a new right or provided a new remedy the Federal courts will enforce that right either on the common-law or equity side of its docket as the nature of the new right or new

> remedy requires. *Van Norden v. Morton*, 99 U. S. 378. Here there can be no doubt that the remedy by injunction against an illegal tax expressly granted by the statute is to be enforced and can only be appropriately enforced on the equity side of the court."

These remarks of the court were in answer to the suggestion "That since there is a plain, adequate and com-"plete remedy by paying the money under protest and "suing at law to recover it back, there can be no equi-"table jurisdiction of the case."

See also *Humes v. Little Rock*, 138 Fed. 929, 933.

In *Williams v. Crabb*, 117 Fed. 193, 197, the Circuit Court of Appeals for the Seventh Circuit said:

> "It is well settled that rights and remedies, legal or equitable, provided by the statutes of the States to be pursued in the State courts may be enforced and administered in the Federal courts, and that the terms 'law' and 'equity' as used in the constitution, although intended to mark a distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well not only rights newly created by the statutes of the States, *but new forms of remedies* to be administered in the courts of the United States according to the nature of the case. A State cannot, by its Legislature, confer a substan-

tive right or remedy in the way of a suit *inter partes*, upon its own citizens that will not be available to the citizens of the other States; nor can it by any device restrict such right or remedy thus made available, to enforcement in its own courts, the conditions of citizenship being such that they would otherwise be enforceable in the Federal courts. By any other view it would be in the power of a State by legislation to deprive citizens of other States either of the new right or *remedy* given by the State statute or of the forum granted by the Federal Constitution and laws. The citizen of another State cannot be compelled to make such election or to accept a *remedy* upon condition that he forego the constitutional forum to which he would otherwise be entitled."

In *Platt v. Lecocq*, 158 Fed. 723, 727, Judge SANBORN, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

"Rights created and remedies provided by the statute of a State to be pursued in the State courts may be enforced and administered in the National courts either at law or in equity as the nature of the rights and remedies may require. 'A party by going into a National court does not lose *any right or appropriate remedy* of which he might avail himself of the State courts in the same locality.' *Davis v. Gray*, 16 Wall. 202, 221; *Darragh v. Wetter Mnf. Co.*, 78 Fed. 7; *National Surety Co. v. State Bank*, 120 Fed. 593, 603; *Barber Asphalt Co. v. Morris*, 132 Fed. 945, 949. The court below,

> therefore, in the hearing of this case and this court upon this appeal stand in the place of the Circuit Court of the State, and have plenary power under the statute of South Dakota to determine the original question of the reasonableness of the rules and practice of the Express Company and 'to do justice in the premises.' "

The statute there referred to was, as will be seen by the report of the case below (150 Fed. 391, 399), a statute which provided that if any common carrier should refuse or neglect to obey any lawful order of the Board of Railroad Commissioners, application might be made in a summary way to any court in any country through which the lines of the carrier passed, alleging such violation or disobedience, and that the court should have power to hear and determine the matter and "enforce its judgment by writ of injunction or other proper process, mandatory or otherwise." Under that statute there is no semblance of a showing of irreparable injury or other fact necessary to equitable jurisdiction.

In *San Francisco National Bank v. Dodge*, 197 U. S. 70, 25 S. C. R. 384, Mr. Justice WHITE in delivering the opinion of the court said:

> "The appellant bank sued to restrain the enforcement of State, county and city taxes, levied for the year 1900, upon shares of stock of the bank.

Adequate averments were made to show equitable jurisdiction. *Cummings v. Merchants National Bank*, 101 U. S. 153, 157, 25 L. Ed. 903, 904; *Hills v. National Albany Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Lander v. Mercantile Nat. Bank*, 186 U. S. 458, 46 L. Ed. 1247, 22 Sup. Ct. Rep. 908. The taxes were alleged to be in conflict with the law of the United States, Rev. Stat. 5219, U. S. Comp. Stat. 1901, p. 3502."

Mr. Justice BREWER, with whom concurred the Chief Justice, Mr. Justice BROWN and Mr. Justice PECKHAM, in a dissenting opinion said:

"This is an equitable suit brought in the United States court, where the distinction between law and equity is constantly enforced. . . . There are two propositions which have entered into the the jurisprudence of this court so thoroughly that they may be regarded as settled law: First, that equity will not interfere where there is a plain, adequate and complete remedy at law; and second, that injunction will not issue to restrain the collection of a tax simply on the ground of its illegality. The first is not only the rule of the Court of Chancery in England, but it is the command of the federal statute.

"Sec. 723 Revised Statutes reads:

" 'Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.'

"This defense was pleaded by the defendant in his answer. . . .

"But it may be said that in the following cases this court has laid down an apparently different rule in respect to the taxation of national bank shares: *N. Y. v. Weaver*, 100 U. S. 539; *Pelton v. Commercial Nat. Bank*, 101 U. S. 143; *Cummings v. Mer. Nat. Bank*, 101 U. S. 153; *Hills v. National Albany Exchange Bank*, 105 U. S. 319; *Evansville National Bank v. Britton*, 105 U. S. 322; *Lander v. Mercantile National Bank*, 186 U. S. 458. . . . In *Cummings v. Merchants' Nat. Bank, Pelton v. Commercial Nat. Bank* being decided on its authority, the right to an injunction was asserted. The case came from the Circuit Court of the United States for the northern district of Ohio, in which district the bank was located. In delivering the opinion of the court Mr. Justice Miller said, on page 157:

" '*But the statute of the State expressly declares* that suits may be brought to enjoin the illegal levy of taxes and assessments or the collection of them. Section 5848 of the Revised Statutes of Ohio, 1880; vol. 53, Laws of Ohio, 178, Secs. 1, 2. And though we have repeatedly decided in this court that the statute of a State cannot control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that, *where a statute of a State created a new right or provided a new remedy, the Federal courts will enforce that right, either on the common-law or equity side of its docket, as the nature of the new right or new remedy requires. Van Norden v. Morton*, 99 U. S. 378, 25 L. Ed. 453. Here there can be no doubt that the remedy by injunction

against an illegal tax, expressly granted by the statute, is to be enforced and can only be appropriately enforced on the equity side of the court.

" 'The statute also answers another objection made to the relief sought in this suit, *namely, that equity will not enjoin the collection of a tax except under some of the well-known heads of equity jurisdiction*, among which is not a mere over-valuation, or the illegality of the tax, or in any case where there is an adequate remedy at law. The statute of Ohio expressly provides for an injunction against the collection of a tax illegally assessed, as well as for an action to recover back such tax when paid, showing clearly an intention to authorize both remedies in such cases.

" 'Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is *designed* to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied, not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power.'

"Two reasons are here stated to justify the exception to the ordinary rule in respect to injunctive relief. First, a State statute, and, second, a design on the part of the State authorities to discriminate. There is no statute of California making such special provision in reference to injunctions, and that reason for a de-

parture from the general rule may be put one side."

The italics are the court's.

In *Village of Norwood v. Baker*, 172 U. S. 269, 19 S. C. R. 187, the case of *Cummings v. Bank* is quoted from and approved, and the statute applied in that case is again applied by the court.

In *Crampton v. Zabriskie*, 101 U. S. 601, 609, the court said:

> "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong when the officers of those corporations assume in excess of their powers, to create burdens upon property holders. *Certainly in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county there would seem to be no substantial reason*

why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate powers."

While what is said there is with reference to municipal corporations, we see no reason why, where a State statute expressly permits it, the same doctrine should not apply to the acts of State officers.

M'Culloch v. Brown, 23 L. R. A. (S. C.) 410.

The Amount in Controversy Under the Taxation Theory.

It is alleged in the bill of complaint that the matter in dispute exceeds the sum of $2000, exclusive of interest and costs. (Par. II.) This allegation is admitted by the demurrer to the bill (*North American Co. v. City*, 151 Fed. 120; *Barry v. Edmunds*, 116 U. S. 550), and there can therefore be no question as to the jurisdiction of the court so far as the amount in dispute is concerned.

Moreover, this suit is not brought to restrain so much of the taxes only as will be levied upon each of complainant banks. It is brought under the State statute quoted, *supra*, to enjoin public officers from doing acts not authorized by law which will result in the creation of a public burden or the levy of an illegal tax. The amount in controversy under this statute must be the whole amount to be expended

in the carrying out of the provisions of the law in controversy.

In *Gibson v. Shufeldt*, 122 U. S. 27, 33, 38, the court in considering this proposition said:

> "In equity, as in admiralty, when the sum sued for is one in which the plaintiffs have a joint and common interest, and the defendant has nothing to do with its distribution among them, the whole sum sued for is the test of the jurisdiction.
>
> "The earliest case of that class is *Shields v. Thomas*, 17 How. 3, in which this court held that an appeal would lie from a decree in equity, ordering a defendant, who had converted to his own use property of an intestate, to pay to the plaintiffs, distributees of the estate, a sum of money exceeding $2000, and apportioning it among them in shares less than that sum. The case was distinguished from those of *Oliver v. Alexander* and *Rich. v Lambert*, above cited, upon the following grounds:
>
> "'The matter in controversy,' said Chief Justice Taney, 'was the sum due to the representatives of the deceased collectively; and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the State. They all claimed under one and the same title. They had a common and undivided interest in the claim; and it was perfectly immaterial to the appellant how it was to be shared among them. He had no controversy with either of them on that point; and if there was any difficulty as to the propor-

tions in which they were to share, the dispute was among themselves, and not with him.

" 'It is like a contract with several to pay a sum of money. It may be that the money, when recovered, is to be divided between them in equal or unequal proportions. Yet, if a controversy arises on the contract, and the sum in dispute upon it exceeds two thousand dollars, an appeal would clearly lie to this court, although the interest of each individual was less than that sum.'

"To the same class belongs *Freeman v. Dawson*, 110 U. S. 264, in which the only matter in dispute was the legal title to the whole of a fund of more than $5,000, as between a judgment creditor and the grantee in a deed of trust. No question arose of payment to or distribution among the *cestuis que trust*, and this court therefore took jurisdiction of an appeal by the trustee from a decree in favor of the judgment creditor.

"In *Market Co. v. Hoffman*, 101 U. S. 112, in which, upon the bill of a number of occupiers of stalls in a market, a perpetual injunction was granted to restrain the market company from selling the stalls by auction, the reason assigned by this court for entertaining the appeal of the company was that 'the case is one of two hundred and six complainants suing jointly, the decree is a single one in favor of them all, and in denial of the right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable.' . . . In the less frequent instances in which similar questions have arisen in

proceedings at common law, the same distinctions have been maintained.

"Where a writ of mandamus was issued to compel a county clerk to extend upon a tax collector's books a sum sufficient to pay several distinct judgments held by different persons, it was held that the case was like *Seaver v. Bigelow* and *Schwed v. Smith*, above cited, and the defendant's right of appeal was determined by the amount of each judgment. *Hawley v. Fairbanks*, 108 U. S. 543. But where the writ commanded a collector to collect a tax of one per cent upon the property of a county, which had already been levied for the joint benefit of all the relators, it was held that the case was like *Shields v. Thomas* and *The Connemara*, above cited, and that the right of appeal depended upon the whole amount of the tax. *Davies v. Corbin*, 112 U. S. 36."

So we say in this case that the value of the matter in dispute is the whole amount of illegal taxation and not the separate parts into which that taxation may ultimately be divided. The proceeding is not one by each taxpayer separately to enjoin the divisible part of the tax to which he may ultimately be subjected, but is to enjoin the whole proceeding which will impose the burden of extra taxation, and their interests in this are joint.

The same rule is illustrated in the cases of *Western Union Telegraph Company v. Norman*, 77 Fed. 13, and

Fishback v. Telegraph Co., 161 U. S. 96, 16 S. C. R. 506.

In the case first above referred to the Telegraph Company brought an action to enjoin a State auditor from certifying to the various county clerks the proportions of an alleged illegal tax to be collected in their several counties. The total amount of the tax exceeded the jurisdictional amount, but the proportion which would be certified to each county did not equal the jurisdictional amount. In that case the court said:

> "The aggregate of these local taxes is thus shown to be over $2000, exclusive of interest and costs. The case we think is not within the principle of *Fishback v. Telegraph Company*, 16 S. C. R. 506, and the previous case of *Walter v. Railroad Company*, 147 U. S. 370. In both these cases it was sought to enjoin the collection of local taxes which had been assessed and levied by the respective counties and municipalities. Hence, the local taxes had been distinctly separated so that a separate action could have been maintained against counties and municipalities if the taxes had been paid under protest. Here it is sought to prevent the auditor from completing the appraisement and levy of taxes which if completed without legal authority would be a wrongful act, and one probably subjecting him to an action by the party injured thereby. However this may be, the amount of tax in controversy between the plaintiff and the defendant for the benefit of the State of Kentucky is over $2000, exclusive of interest and costs."

The same rule has been applied in cases exactly like the case at bar. Thus, in *Brown v. Trousdale*, 138 U. S. 389, a number of taxpayers filed their bill to enjoin the proper officers from levying a tax and to have the bonds for the payment of which the tax was levied declared void. The action was brought on behalf of the plaintiff and all others equally interested. In that case the Chief Justice said:

> "The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs, each claiming under a separate and distinct right in respect to a separate and distinct liability and that contested by the adverse party, is not applicable here. For although as to the tax for the particular year the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute in view of the main controversy far exceeded the limit upon our jurisdiction, and

disposes of the objection of appellees in that regard."

So, in this case, the object is not to enjoin individual taxes, but to enjoin an illegal act which will result in increasing the burden of taxation generally. The interests of the complainants have not been segregated and separated. They are still jointly interested in preventing this burden of taxation.

In *Johnson v. City of Pittsburg*, 106 Fed. 763, the complainant brought his suit to enjoin the city from entering into a contract for street paving. The bill averred that the matter in controversy exceeded $2000, and that the complainant was a taxpayer of the city of Pittsburg. The defendant filed a plea to the jurisdiction on the ground that the amount in controversy was less than $2000, in that "The taxes that can be levied on "complainant's property by reason of the performance "of said contract, cannot amount to $2000." In that case the court said:

> "It will thus be noted the only question now before us is one of jurisdiction—whether the requisite jurisdictional amount is involved. After careful consideration we are of the opinion this plea must be overruled. The bill does not seek to enjoin the levy of a proposed tax or restrain collection of one levied. True, it is averred complainant is a property-owner and taxpayer, but this is evidently done to show he is not an intermeddler and on the

> theory that such facts give him standing to file a bill to question the legality of the contract. If the prayer of the bill were granted on final hearing, the Asphalt Company would be deprived of a contract far in excess of the required jurisdictional sum."

So in the case at bar the allegation that the complainants are taxpayers shows that they are not mere intermeddlers, and gives them a standing to object to the illegal expenditure of far more than $2000 and to the doing of illegal acts which will, under the allegations of the bill, result in the destruction of their business.

The rule is that the general allegation as to the jurisdictional amount is conclusive on demurrer unless the facts appearing on the record create a "legal certainty," that the jurisdictional amount is not involved.

Barry v. Edmunds, 116 U. S. 550.

Here, the facts alleged show to a legal certainty that the jurisdictional amount is involved.

III.

Discrimination.

Complainants may be divided into two classes—banks which have an unimpaired surplus equal to 10 per cent of their capital, and banks which have not.

It is alleged in Par. IX of the bill of complaint:

> "That of your orators the following have not a surplus fund equal to 10 per cent of their capital stock, to wit:
>
> "First National Bank of Bellaire, Union State Bank of Downs, Ford State Bank of Ford, Bank of Hamlin, Farmers & Merchants State Bank of Harper, State Bank of Home City, Iuka State Bank, Exchange Bank of Lenora, Peru State Bank, Peoples Bank of Pratt, South Haven Bank, Farmers State Bank of Whiting, and Willis State Bank.
>
> "That said banks are authorized by all of the laws of the State of Kansas and of the United States to do a banking business without such 10 per cent surplus and cannot legally compel their stockholders to submit to an assessment sufficient to create such a surplus. And said banks may not, therefore, share in the benefits of said law, if any there be."

Banks Which Have Not a Ten Per Cent Surplus.

Placing banks which have not a 10 per cent surplus in a separate class is arbitrary classification, and refusing to such banks the right to procure insurance for their depositors deprives such banks of property without due process of law and deprives such banks of the equal protection of the law.

"Due process of law" and "equal protection of the law" mean that the law shall apply equally both as

to the imposition of burdens and the conferring of benefits upon all who belong to the same class. The classification, however, must be reasonable and not arbitrary.

In *Gulf Ry. Co. v. Ellis*, 165 U. S. 150, this court said:

> "It is well settled that corporations are persons within the provisions of the fourteenth amendment of the Constitution of the United States. *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394, 6 Sup. Ct. 1132; *Pembina Consol. Silver Min. etc. Co. v. Pennsylvania*, 125 U. S. 181, 189, 8 Sup. Ct. 707; *Railway Co. v. Mackey*, 127 U. S. 205, 9 Sup. Ct. 1161; *Railway Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176; *Railway Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207; *Railroad Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255; *Road Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called 'corporations' any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens. But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that, if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a

general proposition, this is undeniably true (*Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350; *Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161; *Walston v. Nevin*, 128 U. S. 578, 9 Sup. Ct. 192; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533; *Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250; *Giozza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721; *Railroad Company v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396; *Marchant v. Railroad Co.*, 153 U. S. 380, 14 Sup. Ct. 894; *Railway Co. v. Matthews*, 165 U. S. 1, 17 Sup. Ct. 243), yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. **That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis.**

"As well said by Black, J., in *State v. Loomis*, 115 Mo. 307, 314, 22 S. W. 350, 351, in which a statute making it a misdemeanor for any corporation engaged in maufacturing or mining to issue in payment of the wages of its employés any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeem-

able at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void: 'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as, in the nature of things, furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary, and a piece of legislative despotism, and therefore not the law of the land.'

"In *Vanzant v. Waddel*, 2 Yerg. 260, 270, Catron, J. (afterwards Mr. Justice Catron of this court), speaking for the Supreme Court of Tennessee, declared: 'Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another.'

"In *Dibrell v. Morris' Heirs* (Tenn.) 15 S. W. 87, 95, Baxter, Special Judge, reviewing at some length

cases of classification, closes the review with these words: 'We conclude upon a review of the cases referred to above, that, whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural, and not arbitrary.'

"In *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, the question was presented as to the power of the State to classify for purposes of taxation, and while it was conceded that a large discretion in these respects was vested in the various legislatures the fact of a limit to such discretion was recognized, the court, by Mr. Justice Bradley, saying, on page 237, 134 U. S., and page 535, 10 Sup. Ct.: 'All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature or the people of the State in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.'

"It is, of course, proper, that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. *But before a distinction can be made between debtors, and one be punished for a failure to pay his debts*

> ***while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other.***"

Classification must therefore rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed. But an act may both grant privileges and impose burdens. In such a case, it is not enough to confer special privileges upon a few favorites of the law, selected without regard to "differences bearing a reasonable and just relation to the act," and attempt to justify the law on the ground that those upon whom the burdens are imposed are selected according to reasonable grounds of classification. Those upon whom the benefits are conferred must be selected according to reasonable grounds of classification as well as those upon whom the burdens are imposed.

Classification with Reference to Burdens. By the law under consideration the burdens are imposed first upon the taxpayers generally, as they pay all of the expenses of the administration of this insurance scheme. This matter of taxation has already been considered.

The burden also falls upon banks by way of assessments, or rather, certain banks are permitted volun-

tarily (so far as the face of the act is concerned) to assume this burden. The question of classification as to this burden is considered, *infra*.

The most onerous burden, however, falls upon banks which are refused the right to procure insurance for their depositors. The question of classification as to this burden will now be considered in connection with classification with reference to benefits.

Classification with Reference to Benefits. As has already been pointed out, the ostensible purpose of the law is to benefit certain classes of depositors in a certain class of banks, and such depositors are the only ones *directly* benefitted by the law. What the law proposes to do is to pay to these depositors the amounts owing to them by a certain class of debtors when all of the assets of those debtors are exhausted, so that it becomes certain that the debtors themselves will not pay.

Here the first question is, What is the difference which bears a reasonable relation to the purposes of the act in question which justifies the State in paying one class of creditors or creditors of one class of debtors, and not paying another class of creditors or creditors of another class of debtors? Why should the State collect and administer a fund for the benefit of A, who lost money by a failure of a bank a year ago, and refuse to aid B, who lost money by the failure of a customer who

bought goods of him, or by the failure of the private banker with whom he deposited his money, or by the failure of a bank with no surplus, or by the failure of a so-called guaranteed State bank in which he had deposited his money and taken a certificate of deposit, payable in less than six months? Admitting, as we freely do, that banks are a necessity to the business of the country, and that the State should take every precaution under its police power to *prevent* bank failures, we say that there is no more reason why, after a bank has failed, the State should pay its debts than why the State should pay the obligations of any other debtor.

> "Before a distinction can be made between debtors and one be punished for a failure to pay his debts while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other."
>
> *Gulf Ry. Co. v. Ellis*, 165 U. S. 150.

So we say here, that before a distinction can be made between creditors and the debt due to one paid by the State and the debt due to another not paid, there must be some difference in the necessity of the creditor for the money or in the effect on the creditor of his failure to get the money.

Passing this general classification which places creditors of banks in one class and all other creditors in another class, we find that creditors of banks are classed among themselves in a most grotesque manner. Depositors in National banks are not entitled to the benefits of the law. Depositors in unincorporated State banks and depositors in incorporated State banks which have not a 10 per cent surplus, or which have not been in business for over a year (with an exception under special circumstances), are not entitled to the benefits of the law. Only depositors in incorporated State banks which have an unimpaired surplus equal to 10 per cent of their capital, and which have been in business for over one year, are entitled to the benefits of the law. Leaving out of consideration for the present the National banks, we find that the basis of classification of depositors in the State banks is the strength of the banks. Depositors in the presumably weaker banks—those which have not stood the test of time and which have no surplus—are not secured, while depositors in the stronger banks are secured.

Now, bearing in mind that this law is for the benefit of depositors, and that it is a public law to be administered by the State with funds raised by taxation, consider the unreasonableness of this classification. Depositors in weak banks, who are most likely to need

the benefits of the law, are denied them, while depositors in strong banks, who are least likely to need the benefits of the law, are entitled to them. A private insurance company, incorporated for profit, may unquestionably classify its risks and refuse bad risks. But for the State to refuse the benefits of a law to those who need them most for no other reason than because they need them most, is an anomaly. The power to pass the law arises from the necessity for the law.

Lawton v. Steele, 152 U. S. 133, 137.
State v. Redmon, 134 Wis. 89.

The State has no power to launch banking corporations with power to receive deposits and then discriminate against their depositors because the banks themselves are not so safe as some other banks. If the interest of the public requires the payment of depositors in strong banks, it doubly requires the payment of depositors in weak banks.

> "The power of classification is upheld whenever said classification proceeds upon any difference which has a *reasonable relation to the object sought to be accomplished.*"
>
> *A. T. & S. F. Ry. Co. v. Matthews*, 174 U. S. 106.

The object sought to be accomplished by this law is to provide for the payment of depositors, and depositors are classed in accordance with their need for the law, and then the benefit of the law is given to the class

which needs it the least. The classification has an unreasonable rather than a reasonable relation to the object sought to be accomplished.

It is of just as much importance to the public at large that the creditors of a defunct bank which had no surplus should be paid, as that the creditors of a defunct bank which had a surplus should be paid. Presumably, the creditor of a defunct bank of the first class needs the money as much as the creditor of a defunct bank of the other class. The creditor of one bank pays taxation at the same rate as the creditor of the other bank.

In other words, if the State may use its money to pay depositors or to secure their payment it may do so only because the interests of the public generally and not because the interests of the depositors only, require it.

In *Lawton v. Steele*, 152 U. S. 133, 137, the court said:

> "To justify the State in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference."

See also—

Hume v. Laurel Hill Cemetery, 142 Fed. 552.
Colon v. Lusk, 153 N. Y. 188.
State v. Redmon, 134 Wis. 89.
Fisher v. Woods, 187 N. Y. 90.

If the State attempts to classify the depositors and to pay or secure the payment to one class and not to another the classification must rest upon some difference which makes it more to the interest of the public that one class should be paid than that another should. To classify depositors according to the banks with which they do business is purely arbitrary. It is as much in the interest of the public that depositors in one bank should be paid, as that depositors in another should be paid.

As we have already pointed out, there is no demand in the interests of the public which justifies this law. From a governmental standpoint it is the use of public money for the purpose of aiding private individuals just as loaning public money to grasshopper sufferers was (14 Kas. 418), or providing aid for fire sufferers (111 Mass. 454), or aiding a manufacturing corporation (20 Wall. 665), or paying the debts of an insolvent railroad company (89 Md. 510.)

If there can be said to be any public interest involved, however, it is that depositors should have their money to use in their various trades and enterprises. If by any stretch of legislative discretion this can be said to be a public purpose, still it must be clear that it is as much in the public interest that a depositor in a bank which did not have a 10 per cent surplus should be paid

as that a depositor in a bank which did have such a surplus should be paid. It is as much in the public interest that one depositor should have his money so that he can continue his business as that the other should. Any classification which distinguishes between the two is not founded upon a "difference which has a "reasonable relation to the object sought to be ac- "complished."

In *State v. Goodwill*, 33 W. Va. 179, it is said:

> "The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and *every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void.*"

To go a step further, we find that although the object of the act is to benefit depositors, no depositor of any class is entitled to the benefits of the act as a matter of right. He can get those benefits only as a matter of favor on the part of some favored bank. No depositor can pay or compel the payment of the premium and thus acquire the benefit of this law as a matter of right. If a depositor does not do business within practical business reach of a bank which may pay the premium,

he cannot get the benefit of the law. If he does live within reach of such a bank, he cannot compel the bank to accept his deposit so that it may be guaranteed. He must go to that bank and say: I am taxed to pay the cost of administering this law. The law is presumably for the benefit of depositors. Yet the law places in your hands the power to grant or withhold its benefits. I cannot have my deposits guaranteed unless I place them in your bank and I cannot compel you to receive them.

This law cannot be distinguished in principle from a law providing that no resident of a city shall be entitled to police protection unless he buy his groceries of the chief of police.

The law places in the hands of certain favored banks, the power to grant or withhold its benefits, and the depositors for whose benefit it was passed can get those benefits only as those favored banks may see fit to grant them.

To summarize:

The act in question is a public law, and is administered with public funds by public officers.

The direct object of the act is to insure depositors—depositors are benefitted and not banks.

The classification of depositors who may and who may not receive the benefits of the act is purely arbi-

trary, and is not founded upon any difference that has any reasonable relation to the object of the act.

The only effect of the classification attempted by the act is to place in the hands of a favored class of banks the power to permit depositors to receive the benefits of the act or to deprive them of those benefits.

The Effect of the Act upon Banks which Have no Surplus.

It will undoubtedly be suggested in answer to the foregoing argument, that any depositor who desires to be guaranteed may withdraw his money from an unguaranteed bank and deposit it in a guaranteed bank. Of course there would not always be guaranteed banks within reach of all depositors, but even if there were, this answer serves only to illustrate the chief vice of the act. In order to get the benefit of this insurance scheme which they are taxed to support, taxpayers must take their money out of one class of banks and put it in a bank of the favored class. If the act were entitled "An act to promote the business of a favored class of banks," its purpose would not be more clear.

The so-called guaranteed banks may under the law (Sec. 7) advertise that their depositors are guaranteed by the bank depositors' guaranty fund of the State

of Kansas. A guaranteed bank may say to depositors in other banks: The Legislature is using the taxpayers' money to guarantee deposits, but you must bring your business to this bank if you want to have your deposits guaranteed. The Legislature has given this bank control of the law, so that it can use it as a premium to offer for business.

That this is the effect of the law cannot be questioned. Whether or not the Legislature in passing the law intended such a result, is immaterial.

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."
>
> *Henderson v. Mayor*, 92 U. S. 259.

> "The courts are not bound by mere forms, nor are they misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution."
>
> *Mugler v. Kansas*, 123 U. S. 623, 661.

The bill of complaint contains the following allegations:

PAR. IX. "That under said guaranty law the depositors in banks which have not become guaranteed banks are not guaranteed, while depositors in banks which have become guaranteed suppose themselves to be guaranteed and are led to believe by the State of Kansas and by said defendant Joseph N. Dolley as Bank Commissioner of the State of Kansas, that they are guaranteed, and all banks which have become guaranteed banks are advertised by the State of Kansas and by the Bank Commissioner thereof as guaranteed banks; *and the result of the enforcement of said law will be to either drive unguaranteed banks out of business and force them to liquidate and wind up their business, or to force banks which have not become guaranteed to make assessments on their stockholders for the purpose of raising a surplus fund equal to 10 per cent of their capital in case they have no such surplus fund,* and to cease to pay more than 3 per cent interest on deposits of any kind, and to relinquish many other valuable rights guaranteed to them by the Constitution and laws of the State of Kansas and of the United States."

PAR. XIV. "That said Bank Guaranty Law, in its force and effect, and in its practical application, is intended to be and is unjustly and unlawfully discriminatory in favor of and in behalf of the banks which shall accept of its provisions, and against all banks, State or National, which shall not accept of its provisions.

"That said law is in its very essence, fraudulent, and promotive of fraud and deception. In its practical workings it gives depositors a false assurance, and persuades and tends to persuade them that they are guaranteed and secured when they are in fact not guaranteed or secured. It requires of the Bank Commissioner a certificate which is false and misleading, and which in its practical working, and especially because it emanates from the sovereign State, tends to mislead and deceive the public as to the degree of security offered. It encourages, makes easy, and directly causes, false representations by so-called guaranteed banks, *which banks are securing deposits by false signs and advertisements* tending to persuade the public that their depositors are guaranteed by the State of Kansas and by an adequate special fund provided by the State of Kansas. *Said act thus gives banks which accept its provisions, the right and power, under the guise and sanction of law, to obtain deposits by false and fraudulent representation; and by virtue of said law said banks are, as a matter of fact, so obtaining deposits, to the great injury of banks honestly and fairly conducted.*

"That said law in its practical operation and effect (under and by virtue of the certificate which under the said act is to be issued by the Bank Commissioner to the banks which accept of the said guaranty provision) is intended to and will enable, authorize and empower the banks which accept the guaranty provisions to hold out to depositors and to the public that the depositors

therein are guaranteed, and that depositors in other banks are not so guaranteed, and all other banks are prohibited by the said law from giving out or advertising that their deposits are guaranteed, whereby and by reason whereof *banks of small capitalization and otherwise insecure may induce and persuade citizens of the State of Kansas, and others, to deposit their money in said guaranteed banks in preference to making such deposits in banks not so guaranteed, and therein and thereby to wrongfully discriminate against and to deplete and diminish the deposits in banks not under the guaranteed system* and to the advantage of the banks which are in the guaranteed system, and as against all banks which cannot, under the terms of the act, go into the said guaranty system, and including National banks, and as against trust companies which cannot go into the system; and by reason of the premises the said act is unconstitutional and void, in that it constitutes an unlawful and unreasonable discrimination in favor of certain banks as hereinbefore described, and as against other banks and trust companies as hereinbefore described, and is unconstitutional and void, being in violation of the provisions of Section 1 of Fourteenth Amendment of Constitution of the United States, hereinbefore more specifically pleaded."

PAR. IX. "That said banks [which have no surplus] are authorized by all of the laws of the State of Kansas and of the United States to do a banking business without such 10 per cent surplus, and cannot legally compel their stock-

> holders to submit to an assessment sufficient to create such a surplus. And said banks may not, therefore, share in the benefits of said law, if any there be."

It is therefore directly alleged in the bill that guaranteed banks *are securing* deposits, and that such banks *are obtaining* deposits to the great injury of other banks. These are allegations of what has happened and not of what will happen.

It was not alleged that complainant banks had already lost all of their business when the bill was filed, or that they had already been driven to cease business. Such allegations would have been absurd, because the object of the bill was to prevent such results. It is alleged that the result of the enforcement of the law will be to drive banks out of business and force them to liquidate and wind up their business in case they cannot, as is the case of banks without the required surplus, obtain insurance for their depositors; and it is further alleged that guaranteed banks will by virtue of the law deplete and diminish the deposits in unguaranteed banks.

Loss of business is what complainants are seeking to avoid, and complainants were not compelled to wait until these results happened before asking for relief.

In the court below it was contended that these were mere matters of inference, argument or opinion, which were not admitted by the demurrer.

The rule is that on demurrer the court must consider not only the facts alleged, but all reasonable inferences to be drawn therefrom.

> *U. S. v. Des Moines Co.*, 142 U. S. 510, 544.
> *Denison Co. v. Thomas Co.*, 94 Fed. 651, 654.

In *City of Hutchinson v. Beckham*, 118 Fed. 399, a demurrer was overruled by the trial court, and defendants declined to plead further. Final decree was entered and appeal taken to the Circuit Court of appeals. In its opinion that court, speaking through Judge THAYER, said:

> "They averred that if the city was left at liberty to enforce the tax in its own way by making daily arrests of its employés *they would eventually quit its service;* that the complainants and all other non-resident merchants in their situation would be subjected to the cost and annoyance of defending repeated suits; *that they would also be prevented from carrying on their business as they had theretofore done; that they would be compelled to transact business in competition with dealers residing in the city of Hutchinson who would not be subject to the tax; and that in this way they would sustain damages in a sum exceeding $2000. These*

> *allegations were admitted by the demurrer to be true if they were material allegations.*"

In *Humes v. City of Little Rock*, 138 Fed. 929, the case was before the court "for final hearing upon the bill." In that case the court said:

> "But it is alleged that the amount of the license is intentionally made prohibitory, and that if it is enforced *the plaintiff will be driven out of business.* The amount in controversy is, therefore, the value of that business, which is alleged to exceed $2000."

Moreover, on demurrer the court must consider those facts of which it will take judicial notice.

Lamson Co. v. Siegel Co., 106 Fed. 734.

The court will take judicial notice of the impulses governing human conduct; of natural and economic laws; of the cause and effect of competition; and from these of the fact that depositors will place their money where they believe themselves to be secured against loss by the State rather than where they have no such security.

State v. Arnold, 140 Ind. 628.
American Bank v. Bushey, 45 Mich. 135.
Hubbard v. Montgomery Co., 59 W. Va. 75.
Davies v. Hunt, 37 Ark. 574.

The court will also take judicial notice of matters of current history, "of what all well-informed persons ought to know," and of the general condition of the various agencies of the government under which it sits.

In *State v. Kelly*, 71 Kas. 811, the court said:

> "The history and conditions of the people within the jurisdiction of a court at the time of the passage of an act which it is called upon to construe for the purpose of determining its validity are familiar to a court, and its knowledge of the same should aid it in assuming the proper viewpoint from which to discover the object of the law—particularly a law of the nature of the one under consideration. The history of a State, which should include the facts surrounding the enactments of its Legislature and the questions therein raised upon the passage of every law of an economic nature, as well as the doings of its people and the public questions which have agitated their minds, is known by a court. If the act under consideration be one passed immediately before a court is called upon to construe it, the court is as familiar with the conditions of the people as any well-informed citizen of the State. . . .
>
> "It knows the enterprises of the people of the State in a business way quite as well as it understands the agricultural conditions. It also knows those general facts concerning the public aims and interests of the State in social and economic ways which all well-informed people know, including the questions that agitated the public mind at the

time this certain law was enacted, and knows the history of the Constitution and the reason for the adoption of certain provisions and the rejection of others.

"A court cannot divest itself of the knowledge of all these things in construing a statute or constitutional provision, even if it were disposed so to do. The consideration of this knowledge without proof of the facts is generally termed 'judicial notice,' and, for the want of a better expression, it will suffice; but the term means no more than that courts, in construing the law, will bring to their aid all those facts which are known by all well-informed persons because they are matters of public concern. . . .

"The principle is stated thus in section 77 of Bishop on Statutory Crimes, third edition:

" 'They [courts] do not close their eyes to what they know of the history of the country and of the law, of the condition of the law at the particular time, of the public necessities felt, and other like things.'

" 'Courts are authorized to collect the intention of the legislature from the occasion and necessity of the law—from the mischief felt, and the objects and remedy in view.' (*Sibley v. Smith et al.*, 2 Mich. 486, 487.)

" 'But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. (*United States v.*

Union Pacific R. R. Co., 91 U. S. 72, 79, 23 L. ed. 224.)

"'Courts will take judicial notice, without proof, of events which are generally known, within the limits of their jurisdiction.' (*State ex rel. Thayer v. Boyd*, 34 Neb. 435, 51 N. W. 964.)"

The court must therefore in passing upon the demurrer take into consideration the fact that depositors will put their money where they believe there is the smallest risk of loss; it must consider the recent history of the country with regard to bank guaranty laws; in order to draw reasonable inferences it must consider past experiences with reference to such laws—and the court will find not only that the results pleaded are reasonable inferences, but that they are necessary results.

In order to find these historical facts and past experience the court need not go beyond the last report of the Comptroller of the Currency. At page 89 of that report is this statement:

"Following the action of Oklahoma, the legislatures of the States of Kansas, Nebraska and Texas enacted laws providing for the guaranteeing of deposits in banks." (Annual Report of the Comptroller of the Currency, 1909.)

At pages 25 to 29, inclusive, of the report is a list of all of the National banks in the country which went

into liquidation during the year ending October 31st 1909. One hundred and forty-nine banks are contained in this list, twenty-five of which, as is shown by page 24 of the report, were absorbed by other National banks, and therefore did not cease to be National banks. Of the remaining one hundred and twenty-four of these banks, seventy-four were National banks doing business in Oklahoma, and fourteen of those went out of business while sixty of them reorganized as State banks; in other words, out of a total of one hundred and twenty-four National banks which during the period named ceased to do business as National banks, seventy-four of them were banks in Oklahoma under the Oklahoma bank-guaranty law, and sixty of those reorganized as State bnaks.

The table further shows that during the first nine months of the period covered by the report not a single National bank in Kansas went into liquidation, but during the three months which began June 1st, 1909, seven Kansas National banks reorganized as State banks. The first of these to so reorganize did so June 15th, 1909. The Kansas bank-guaranty law went into effect June 30th, 1909.

At pages 256 and 257 of the same report is a table showing the National banks which went into voluntary liquidation during the year ending October 31st,

1908. This table shows that from the 1st day of August to the 31st day of October, 1908, thirty-one National banks went into voluntary liquidation in the United States, and fifteen of those, or almost fifty per cent of them, were National banks doing business in Oklahoma, and that five of them were National banks doing business in Texas. So that twenty out of a total of thirty-one were banks which were affected by the bank-guaranty laws of Texas and Oklahoma.

At pages 22 and 23 of the same report are tables showing that in Texas one hundred and forty National banks were in voluntary liquidation from reasons other than insolvency on October 31st, 1909, in Nebraska fifty-nine, in Kansas one hundred, and in Oklahoma one hundred and sixteen.

In view of this history we say that the allegations of the bill of complaint were not extravagantly or improvidently made.

Any law that will have such a marked effect upon the business of National banks must have a much more injurious effect upon the business of smaller State banks which have no surplus.

It will not do to say that banks which have no surplus may qualify by acquiring one. As well say that a law conferring special privileges upon men worth $50,-

000 is not unconstitutional, because all men can put themselves in the favored class by getting $50,000.

Moreover, the provision that only banks may pay the premium is a purely arbitrary arrangement, permissible, perhaps, if it does not deprive anyone of his rights, but not permissible if it does. It is no more reasonable to say that a depositor shall not have his deposits repaid to him by the State unless he banks with a corporation which has certain qualifications, than it would be to say that a man shall not buy food unless he banks with such a corporation. It is differences between depositors which justify classification of depositors, and not differences in the corporate powers of banks which justify such classification.

In *State v. Haun*, 61 Kas. 146, 153, the court said:

> "The obvious intent of the act is to protect the laborer and not to benefit the corporation. Why should not the nine employés who work for one corporation be equally protected with the eleven engaged in the same line of employment for another corporation? If such law is beneficial to wage-earners in the one instance, why not in the other? The nine men lawfully paid for their labor in goods at a truck store might with much reason complain that the protection of the law was unequal as to them when they saw eleven men paid in money for the same service performed for another corporation engaged in a like business. *Such inequality destroys the law.*"

The case presented to the court, therefore, is this: The State proposes to insure or guarantee deposits in banks—not merely to authorize banks to procure such insurance, but to itself insure them. It creates what is in effect an insurance company, and pays all the expenses of that company. It does not permit all depositors to be insured, and its classification of depositors is purely arbitrary, having no relation whatever to the purpose of the act. It does not permit depositors themselves to buy insurance, but permits only a certain class of banks to procure insurance for their depositors, thus putting in the hands of those banks the power to offer the benefits of this scheme and whatever good may be obtained from the expenditure of this public money as a premium to depositors to leave other banks and deposit with them.

Banks which have not a 10 per cent surplus cannot procure insurance for their depositors. The effect of this will be to deprive such banks of their business and to compel them to liquidate and to go out of business.

A law may discriminate unjustly, either directly and by direct action upon the one discriminated against, or indirectly and by affecting others. A law might provide that State banks might receive deposits but that National banks might not. This would be

direct discrimination. Or a law might provide that any person who deposited money in any bank other than a State bank would be guilty of a felony. National banks would not even be mentioned, but it cannot be doubted that such a law would discriminate against them or that such a law would deprive them of property without due process of law.

The law under consideration here does not go so far as to make it a felony to deposit money in banks without a surplus, but it does penalize those who deposit money in such banks by depriving them of all those benefits of a law to which under classification upon a reasonable basis, they would otherwise be entitled. It does not say that such banks shall not be entitled to compete for business on the same terms as other banks, but it does say that those who deposit in banks having a 10 per cent surplus shall have a privilege which is arbitrarily refused those who deposit in other banks.

It is admitted by the demurrer that the effect of this discrimination is to deprive banks which have no surplus of their business.

> "The distinction between destroying what is denominated the corporate franchise and destroying its vivifying principle, is as incapable of being maintained as the distinction between the

right to sentence a human being to death and the right to sentence him to total deprivation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute."

Osborn v. U. S. Bank, 9 Wheat. 738.

In *Hayes v. Missouri*, 120 U. S. 68, the court said:

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in *Barbier v. Connolly*, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' 113 U. S. 27, 32."

In *Yick Wo v. Hopkins*, 118 U. S. 356, Mr. Justice MATTHEWS, delivering the opinion of the court, said:

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'nor shall any State deprive any person of life, liberty or property without due process

> of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, Mr. Justice HARLAN, delivering the opinion of the court, said:

> "We have also said: 'The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that

in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.'"

In *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, Mr. Justice BREWER, delivering the opinion of the court, said:

"The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

In *Cotting v. Kansas City Stock Yards Co. &c.*, 183 U. S. 79, Mr. Justice BREWER, delivering the opinion of the court, and quoting with approval from the opinion of Judge CATRON, in *Vanzant v. Waddel*, 2 Yerger, 260, said:

"Every partial or private law, which directly proposes to destroy or affect individual rights,

or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

In *State v. Goodwill*, 33 W. Va. 179, it is said:

"The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void."

"The inhibition of the Fourteenth Amendment, that no State shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons being singled out as a special subject for discrimination and favoring legislation." *State v. Mitchell*, 97 Me. 66.

In *McKinster v. Sager*, 163 Ind. 671, that court said:

"But it is not the business of the State to make discriminations in favor of one class against another, or in favor of one employment against another. The State can have no favorites. Its business is to protect the industry of all, and to give all the benefit of equal laws."

We submit that under all of the authorities it must be held that the act under consideration is unconstitutional and void, in that it deprives banks which have not a 10 per cent surplus of their property without due process of law.

The bill of complaint contains not only the general allegation that the matter in dispute exceeds the sum or value of $2,000, exclusive of interest and costs (Par. II), but also the specific allegation that "the "right of your orators and each of them to transact "the banking business is of the value of more than "$2,000, exclusive of interest and costs."

These allegations are, of course, admitted by the demurrer.

Banks Which Have a Ten Per Cent Surplus.

It is alleged in the bill of complaint (Par. XVII) that:

> "Said defendants, Joseph N. Dolley, Bank Commissioner, and Mark Tulley, State Treasurer, are meaning and intending to enforce each and singular of the obligations and provisions of the said law, and have already admitted a considerable number of State banks of the State of Kansas to the privileges granted under said law, and to that end have issued to certain banks certificates to that effect, and that the applications of other State banks are now pending before the Bank Commissioner for examination, and that the said Bank Commissioner threatens, means and intends to

> accept and receive the said applications and to issue to the said banks so applying, certificates as provided for in Section 2 of said act, unless restrained and enjoined by the order of this court, —all of which is and will be to the irreparable damage of the complainants herein."

As we have seen, the law discriminates in favor of banks which have been admitted, and the effect of this discrimination will be to deprive complainant banks of their business. It was contended in the court below, however, (and the contention was sustained by the trial court,) that because complainants had the option of either being admitted under the law or of staying out they could not complain of this discrimination. Appellants' contention is, that the alternatives offered are not such alternatives as make the matter optional as a matter of law. A choice between a loss of business and being driven out of business on the one hand and of doing a series of illegal acts on the other hand, is not, in fact or in law, a choice. Giving a man the alternative of being deprived of his property or of doing an illegal act is depriving him of his property without due process of law just as certainly as it would be if he were not given the alternative of doing the illegal act.

The alternatives offered to the class of banks under

consideration are to "participate" or not to "participate."

The result of not participating will be loss of business. This is admitted by the demurrer.

The result of participating will be that the bank will submit itself to a law which will compel it—

Illegally to use its stockholders' money;

Illegally to discriminate among its depositors; and

Illegally to discriminate between its depositors and its other creditors.

It will acquire its right to do these illegal acts only by the payment of a considerable sum of money and by waiving its right to pay more than 3 per cent interest on deposits, and its right to pay interest on savings deposits withdrawn before July 1 or January 1 next following the date of deposit, and its right to pay interest on time certificates cashed before maturity.

Illegal Use of Stockholders' Money. The law (Section 1) provides for a resolution of the board of directors "authorized by its stockholders" before a bank may be admitted. It does not provide for a unanimous vote of the stockholders. As against a dissenting stockholder the law is unconstitutional and a bank may be enjoined at the suit of a dissenting stockholder from participating.

Larabee v. Dolley, 175 Fed. 365.

The use of the corporate funds for the purpose of participating under this act is therefore illegal.

It is true that this illegal use may be justified by a unanimous vote of the stockholders. But the stockholders invested their money in the stock of the bank under a contract that it should be employed only in the business of that bank and should not be risked in insuring or guaranteeing the obligations of other banks; and under a statute providing that:

> "No bank shall employ its moneys, directly or indirectly, in trade or commerce, by buying and selling goods, chattels, wares and merchandise, and shall not invest any of its funds in the stock of any other bank or corporation, nor make any loans or discounts on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith."
>
> Gen. Stat. Kas., 1901, § 417.

The State could not by direct compulsion take this stockholder's money and use it for the purposes of this act.

> "That the act of the bank in pledging its property, as has been done in this case, to be applied to the discharge of the obligations of third parties, in the absence of the authorization of the act in question, would be an act beyond its authority, *ultra vires* and void, must be conceded. That the contract of the depositor with a bank is a private

contract, and that money taken for the purpose of reimbursing such depositor for loss sustained, or which may be sustained on such contract, is a taking of property for a private and not a public or governmental purpose, is conclusively settled. (*State v. Township of Osawkee*, 14 Kan. 418; *Lowell v. Boston*, 111 Mass. 454.) That the State may not through the exercise of the power of taxation, or by the exercise of any other governmental power, take private property for a purely private purpose is also conclusively established. (*Loan Ass'n v. Topeka*, 20 Wall. 655; *Parkersburg v. Brown*, 106 U. S. 487; *Cole v. LaGrange*, 113 U. S. 1; *Dobbins v. Los Angeles*, 195 U. S. 223; *Mo. Pac. Ry. v. Nebraska*, 164 U. S. 403; *Dodge v. Mission Township*, 107 Fed. 827; *Crescent Liquor Co. v. Platt*, 148 Fed. 894; *Alma Coal Co. v. Cozad*, 79 O. St. 384; *Baltimore & Eastern Ry. Co. v. Spring*, 89 Md. 510; *Lucas v. State*, 75 O. St. 114; *State v. Froehlich*, 118 Wis. 129; *William Deering & Co. v. Peterson*, 75 Minn. 118; *State v. Switzler*, 143 Mo. 287.)

"As, therefore, an attempt on the part of the Bank to employ its property for the purpose of securing the contract of deposit made by an individual with another bank, or in reimbursing such depositor for loss sustained on his contract, is clearly beyond its power and void as against complainant, a shareholder in the Bank; and as the use of money for such purpose is a purely private use, for which the State may not take it, it follows, of necessity, that that which it is beyond the power of the State to take directly, is beyond its power to authorize a corporation of its creation to take for

> such purpose, against the protest of complainant, a minority shareholder dissenting therefrom; and it must be held that the act of the State in attempting to confer such power on the Bank impairs the obligations of the contract of complainant who dissents therefrom, with the Bank, and with the State, in violation of article 1, section 10 of the National Constitution."
>
> *Larabee v. Dolley*, 175 Fed. 365.

We submit, therefore, that the State cannot by granting special privileges to other banks by which such other banks would get all the business, compel stockholders to consent to the taking of their money.

The use of money by a bank for the purposes of this act is therefore either illegal and unauthorized, or illegal and authorized only by an authority illegally forced from the stockholders.

Illegal Discrimination among Depositors. As already pointed out, the following classes of depositors are not guaranteed under the law:

Depositors who receive any interest on checking accounts.

Depositors receiving more than three per cent interest on time certificates.

Depositors holding time certificates under six months.

Depositors holding time certificates over one year.

Depositors holding time certificates where interest does not cease at maturity.

Depositors with savings accounts of any kind exceeding $100.

Depositors with savings accounts of any amount if subject to check.

Depositors with savings accounts of any amount whether subject to check or not if not subject to the sixty-day withdrawal clause.

Depositors whose deposits are primarily rediscounts.

Depositors whose deposits are primarily money borrowed by the bank.

Depositors who have any other security than the bank guaranty law.

All we have said heretofore regarding classification applies to this classification. It is arbitrary, unlawful and unconstitutional in the last degree. We defy anyone to point out why a poor laborer who has $101 in a savings bank should not be guaranteed while a wealthy man, who, having superior information regarding the condition of the bank, has reduced his deposit to $99, should be secured. Yet the only alternatives offered to these banks are to lose their business or place themselves where by law they are compelled to thus discriminate among their depositors.

Illegal Discrimination between Depositors and Other Creditors. Under the law (Sec. 4) all of the assets of an insolvent bank must be paid first to *depositors*. The janitor who has a week's wages coming to him is not entitled to anything until the depositors are paid. Here the discrimination is arbitrary and unjust.

A bank with $2,000,000 of deposits subject to assess-

ment would be compelled to deposit $10,000 in the "good faith" fund, and might be compelled to pay $5,000 in assessments the first year. Thus it would have $15,000 of its stockholders' money tied up in this scheme and would be liable for $5,000 more each year. Yet at any time any one of its 50 or more stockholders or of its 1000 or more depositors might enjoin its further participation in the scheme, as in the case of the Exchange Bank of Hutchinson (175 Fed. 365), and if insolvency ensued its creditors could enjoin the carrying out of the scheme and the money paid by it would be wasted. By proposing to go into the scheme the bank would place upon its stockholders, depositors and creditors as to whom it stands in a fiduciary position the burden of bringing suits to protect their rights.

We submit that no bank has the right to go into a scheme of this character, and that the alternative of either losing its business or participating in this scheme is in law and in fact no alternative. The effect of the law is therefore to deprive these banks of their property without due process of law.

CONCLUSION.

Little or no attempt was made by defendants below to justify the arbitrary classifications made by this law. Practically the only defense was that the banks could not raise the question of the constitutionality

of the law. Yet if the banks cannot, who can? The record shows that the Bank Commissioner and the State Treasurer, who should refuse to enforce the law and to waste the public funds in its enforcement, insist upon its enforcement, and that the Attorney-General, whose duty it should be to prevent its enforcement, is aiding them in their endeavor to enforce it. Depositors and creditors may not object to its enforcement until the insolvency of the bank in which they are interested. If the banks, the parties most vitally interested, may not object to the law, they must either submit to a destruction of their business or pay their money in to the State on this scheme with the knowledge that when the insolvency of any bank ensues some depositor or creditor who has been discriminated against will prevent the use of the money in the manner intended by the law.

We submit that complainant banks are entitled to relief at this time.

Respectfully submitted.

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J. W. GLEED,
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APPENDIX.

Digest of the Kansas Bank Guaranty Law.

1. The banks which are authorized and empowered to participate in the assessments and benefits and to be governed by the regulations of the act are—

A. Any *incorporated* State bank already doing business in this State,

Having a paid-up and unimpaired surplus equal to 10 per cent of its capital.

B. Any bank which may, after the passage of the act, be authorized to do business in this State,

Which shall have been actively engaged in the business of banking for at least one year,

Having a paid-up and unimpaired surplus equal to 10 per cent of its capital.

C. Any bank which may, after the passage of the act, be authorized to do business in this State,

Having a paid-up and unimpaired surplus equal to 10 per cent of its capital,

Doing business in a town in which all other banks shall have failed to become guaranteed banks within six months after the taking effect of this act,

Whether it has been actively engaged in business for one year or not.

A bank seeking to become guaranteed—

Must apply by resolution of directors authorized by stockholders,

Must be examined by the Bank Commissioner, and if found—

(*a*) To be solvent,

(*b*) To be properly managed,

(*c*) To be conducting its business in strict accordance with the banking laws of Kansas,

Must deposit with the State Treasurer the bonds and money required by subsequent sections of the act,

And will then be entitled to a certificate stating—

That it has complied with the provisions of the act, and

"*That its depositors are guaranteed by the Bank Depositors' Guaranty Fund of the State of Kansas.*"

SEC. 2. The deposit of bonds required by the preceding section is—

A deposit "as an evidence of good faith" with the State Treasurer, subject to the order of the Bank Commissioner, which deposit must be at all times maintained, of United States, Kansas or Kansas municipal bonds such as the School Fund Commissioners are permitted to buy,

To the amount of $500 "for every $100,000 or fraction thereof of its average deposits eligible to guaranty (*less its capital and surplus*)," as shown by its last four statements; but

No bank shall deposit less than $500 of bonds.

Such bonds shall not be charged out of the assets of the bank until default in payment of assessments.

Cash may be deposited in lieu of bonds.

In addition, each bank shall pay in cash,

An amount equal to 1-20 of 1 per cent of its average deposits eligible to guaranty, *less its capital and surplus;* but

No bank shall pay less than $20,

Which payment shall be credited to "the Bank Depositors' Guaranty Fund" with the State Treasurer.

Any bank coming in after the first annual assessment for 1910, except banks formed by consolidation or reorganization of banks already guaranteed, shall in addition to the above "be assessed an amount approximately equal to its proportionate share of the money then in the Depositors' Guaranty Fund after all losses shall have been deducted, the amount of such assessment to be determined by the Bank Commissioner."

After the making of such deposit and payment—

"The payment of such deposits of said bank as are specified in this act shall be guaranteed as herein specified."

SEC. 3. The Bank Commissioner during January in each year shall—

Make assessments of 1-20 of 1 per cent of the average guaranteed deposits *less capital and surplus*,

The minimum assessment in any case to be $20,

Until the Bank Depositors' Guaranty Fund shall be approximately $500,000 over and above cash deposited in lieu of bonds, and shall then discontinue assessments.

When the fund of $500,000 shall be depleted the Bank Commissioner shall make additional assessments.

Not more than five assessments shall be made in one calendar year.

The fund shall be deposited in State depositories like other State funds, and shall be credited with the minimum rate of interest provided by law (2 per cent) on daily balances.

SEC. 4. When any bank shall be found to be insolvent, the Bank Commissioner—

Shall take charge and wind up its affairs,

Shall issue to each depositor upon proof of claim a certificate bearing 6 per cent interest, except

Where a contract rate exists on the deposit the certificate shall bear the contract rate.

After the officer in charge shall have realized on the assets of the bank and exhausted the liability of its stockholders,

And shall have paid *all funds* so collected in dividends to the *depositors*,

He shall certify all balances due on guaranteed deposits to the Bank Commissioner,

Who shall draw checks on the State Treasurer, payable out of the Guaranty Fund for such balances.

If the Guaranty Fund together with the five authorized assessments shall be insufficient, the depositors shall be paid *pro rata*, and the balance shall be paid when the next assessment shall be available.

When any money shall be paid to any depositor out of the Guaranty Fund, all claims and rights of action of such depositors shall revert to the Bank Commissioner for the benefit of the Guaranty Fund until such fund shall be fully reimbursed, with 3 per cent interest per annum.

SEC. 5. A penalty of 50 per cent shall be added to assessments not paid after 30 days' notice.

When any bank shall fail to remit the amount of an assessment, a sufficient amount of the bonds deposited by it shall be sold at public sale to pay the assessment.

Remainder of bonds shall be forfeited if the bank shall not within 60 days after default remit the full amount of assessments and penalties and restore the deposit.

Upon failure by a bank to pay assessments the Bank Commissioner shall examine it, and—

If found to be insolvent he shall take charge and liquidate;

If found to be solvent he shall cancel its certificate as a guaranteed bank and cause to be displayed in its banking room for six months a card 20 by 30 inches, reading "in large plain type":

"This bank has withdrawn from the Bank Depositors' Guaranty Fund, and the guaranty of its deposits will cease"—six months after the date of posting the card.

Any bank electing to withdraw from the Bank Depositors' Guaranty Fund may do so by—

Giving notice to the Bank Commissioner and

Displaying the card quoted above,

"And *at the end of six months* as aforesaid may receive its bonds (provided always that said bank shall have paid assessments in full to date) *when the affairs of all banks in liquidation at the expiration of said six months shall have been closed up and the said bank shall have paid its assessment on account of same.*"

SEC. 6. "Deposits which do not bear interest, and the following deposits only, shall be guaranteed by this act:

"Time certificates (*a*) not payable in less than six months from date and not extending for more than one year, (*b*) bearing interest at not to exceed three per cent per annum, and (*c*) on which interest shall cease at maturity;

"Savings accounts (*a*) not exceeding in amount one hundred dollars to any one person, and (*b*) not subject

to check, (*c*) upon which the bank has reserved in writing the right to require sixty days' notice of withdrawal, and (*d*) bearing interest at not to exceed three per cent per annum."

The following are by express provision not guaranteed:

"Deposits which are primarily rediscounts or money borrowed by [from] the bank, and

"All deposits otherwise secured."

And the guaranty shall not apply

To a bank's obligation as indorser upon bills rediscounted,

To bills payable, or

To money borrowed temporarily.

SEC. 7. Banks shall keep a record of the rate of interest paid, and make quarterly statements thereof to Bank Commissioner.

If a bank pays more than 3 per cent interest on any class of deposits and advertises that its deposits are guaranteed, it must state in its advertisement that deposits bearing more than 3 per cent are not guaranteed.

No bank shall participate in the fund which—

Pays interest at a rate greater than 3 per cent per annum on any form of deposit;

Pays any interest on savings deposits withdrawn before July 1 or January 1 next following date of deposit; or

Pays interest on any time certificate cashed before maturity.

Existing contracts excepted from above.

Officers or persons acting for guaranteed banks who shall pay or promise to pay to any depositor interest

in excess of maximum rate (3 per cent) guilty of a misdemeanor.

"The display of any card or other advertisement tending to convey the impression that the deposits of the bank are guaranteed by the State of Kansas, either directly or indirectly" is made a misdemeanor.

"Any bank displaying a card or advertisement to the effect that its deposits are guaranteed by the Bank Depositors' Guaranty Fund of the State of Kansas when not authorized so to do" shall be subject to fine.

SEC. 8. Trust companies organized under the laws of this State and now in operation may reorganize as State banks.

"Any private bank or National bank having the required capital and being otherwise qualified may reorganize as a State bank;

"Or any newly organized bank taking over the business of another bank, otherwise qualified, may immediately become a guaranteed bank by depositing bonds or money and paying its assessments and otherwise complying with the provisions of this act."

SEC. 9. A solvent bank "*upon retiring from business and liquidating its affairs*" after all its depositors shall have been paid shall be entitled to receive back its bonds but not any unused assessment;

Provided, that if it be turning over its business to another bank it shall not receive back its bonds until the bank receiving its business shall have deposited bonds in lieu thereof.

SEC. 10. Bonds deposited may be exchanged for

other bonds "in the discretion of the Bank Commissioner."

SEC. 11. If at any examination a guaranteed bank shall be found to be violating any of the provisions of the act, it shall be notified, and given 30 days in which to comply with the act.

If it shall not comply within 30 days the Bank Commissioner shall cancel its certificate and forfeit the bonds deposited by it.

SEC. 12. All bonds and money shall be kept separate and in a separate account by the State Treasurer.

Coupons shall be cut from bonds and sent to depositing banks 30 days before due, if bank is not in default.

SEC. 13. Any National bank,

Doing business in the State of Kansas,

Under the laws of the United States,

After examination by State Bank Commissioner, and

Upon his approval as to its financial condition; and

"*Upon the same terms and conditions as apply to State banks,*"

May participate in the assessments and benefits of the guaranty fund.

After being admitted to such participation such National banks—

"Shall forward to the Bank Commissioner of the State of Kansas detailed reports, in form to be provided by him, of its condition on the dates of the usual called statements of State banks," and

"Shall submit to one examination each year by his

department (or oftener in his discretion), as provided by the banking laws of the State of Kansas, and pay the usual fees therefor."

Should a National bank disregard or refuse to comply with any recommendation made by the Bank Commissioner, in conformity with the provisions of this act, it shall immediately be subject to the provisions and penalties of this act and its certificate of membership in the Bank Depositors' Guaranty Fund shall be canceled.

SEC. 14. It shall be unlawful for any guaranteed bank to receive deposits continuously for six months in excess of ten times its capital and surplus.

Violation of foregoing punished by cancellation of certificate and forfeiture of bonds.

SEC. 15. All reports received by Bank Commissioner shall be preserved by him in his office.

Bank Commissioner and State Treasurer may make requisitions on State Printer for blanks and record books.

SEC. 16. "All acts and parts of acts in conflict with this act are hereby repealed in so far as they so conflict, *but no provision of any banking law or other statute of this State shall be construed to be amended, modified or repealed, except in so far as necessary to permit the unrestricted operation of this act as applied to banks participating in the privileges of this act.*"

SEC. 17. Act shall take effect June 30, 1909.